LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

Docket No. 73-361

AUGUSTE JOSEPH RICORD,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT IRA HANDMAN
Attorney for Petitioner
36 West 44th Street
New York, N. Y. 10036
Tel. (212) 986-5460

TABLE OF CONTENTS

	PAGE
A. The Opinion Below	2
B. Jurisdiction	2
C. Questions Presented	2
D. Constitutional Provisions, Statutes and Rules involved are as follows: This material is attached as Appendix C	3
E. Statement of the Case	3
Statement of Facts	4
POINT I—The procedure by which the Indictment of Petitioner Ricord was secured, Constituted a Blatant Violation of the Fifth Amendment to the United States Constitution	7
POINT II—The warrantless searches and seizures of the drugs were in violation of the Fourth Amendment and the denial of the suppression requires reversal of the conviction	18
POINT III—Since no one testified to any acts or conversations evidencing guilty knowledge on the part of petitioner the Government failed to prove the essential element of "knowledge" in the count of conspiracy to violate Title 21, U.S.C. §§ 173, 174....	26
POINT IV—The actions of the Government of the United States in forcing Paraguay to extradite petitioner was an "act of bad faith toward the Government" of Paraguay, which "entails international consequences" and violates "a rule of what we would now call United States foreign relations law devised by the court"	29
POINT V—The conduct of the Trial Judge and the prosecution denied petitioner a fair trial and effective assistance of counsel	33
CONCLUSION	37

TABLE OF CASES

PAGE

Alderman v. *United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 176 (1969) 22

Bollenbach v. *United States*, 326 U.S. 607 37

California v. *Byers*, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 9 (1971) 21

Coolidge v. *New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) 25

Costello v. *United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956) 7

Fiocconi v. *Attorney General of United States*, 462 F.2d 475 (2d Cir. 1972) 30

Ingram v. *United States*, 360 U.S. 672, 678, 79 S. Ct. 1314, 1319, 3 L. Ed. 2d 1503 (1959) 26

Jones v. *United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960) 22

Lawn v. *United States*, 355 U.S. 339, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958) 9

McNabb v. *United States*, 318 U.S. 332, 347, 63 S. Ct. 608, 616, 87 L. Ed. 819 (1943) 37

Ohnstead v. *United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 2d 944 (1928) 21

Sanches v. *United States*, Docket No. 71-6278 (June 21, 1973) 22, 24

Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206, 224, 73 S. Ct. 625, 635, 97 L. Ed. 956 (1953).. 37

United States v. *Arcuri*, 282 F. Supp. 347 (E.D.N.Y. 1968), *aff'd*, 405 F.2d 39 (2d Cir. 1968) 10, 12, 16

United States v. *Andrews*, 381 F.2d 377 (2d Cir. 1967) 11

United States v. *Beltram*, 388 F.2d 449 (2d Cir. 1967) 11

United States v. *Birrell*, 470 F.2d 113 (2d Cir. 1972).... 19

PAGE

United States v. *Blue*, 384 U.S. 251, 86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966) 10

United States v. *Borelli*, 366 F.2d 376 (2d Cir. 1965), *cert. denied*, *Cinquigrano* v. *United States*, 379 U.S. 960, 85 S. Ct. 647, 13 L. Ed. 555 11

United States v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972) 11

United States v. *Febre*, 425 F.2d 107 (2d Cir. 1970), *cert. denied*, 400 U.S. 849 26

United States v. *Giglio*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) 32

United States v. *Heap*, 345 F.2d 170 (2d Cir. 1965) 11

United States v. *Hernandez*, 290 F.2d 86 (2d Cir. 1961) 27

United States v. *Jeffers*, 342 U.S. 48 (1950) 22

United States v. *Lasalandra*, 421 F.2d 1261 (2d Cir. 1970), *cert. denied*, 398 U.S. 931 26

United States v. *Liebowitz*, 240 F.2d 39 (2d Cir. 1969) 14

United States v. *Messina*, 388 F.2d 393 (2d Cir. 1968), *cert. denied*, 390 U.S. 1026, 88 S. Ct. 1413, 20 L. Ed. 283 11

United States v. *Payton*, 363 F.2d 996 (2d Cir. 1966) 11, 15

United States v. *Sacwald*, 450 F.2d 1159 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 21

United States v. *Steward*, 451 F.2d 1203 (2d Cir. 1971) 27

United States v. *Tane*, 329 F.2d 848 (2d Cir. 1964) 11

United States v. *Umans*, 368 F.2d 725 (2d Cir. 1966), *cert. denied*, 389 U.S. 80, 88 S. Ct. 253, 19 L. Ed. 2d 255 (1967) 11

United States v. *Youngblood*, 379 F.2d 365 (2d Cir. 1967) 13

Wilson v. *United States*, 250 F.2d 312 37

Wong Sun v. *United States*, 371 U.S. 471 S. Ct. 407, 9 L. Ed. 2d 441 (1963) 22

IN THE

Supreme Court of the United States

October Term, 1973

Docket No.

AUGUSTE JOSEPH RICORD,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Auguste Joseph Ricord, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit of June 6, 1973 affirming the judgment entered against him in the District Court for the Southern District of New York on January 29, 1973.

On Order extending petitioner's time to file this Writ until August 27, 1973 has heretofore been granted by Mr. Justice Marshall.

A. The Opinion Below.

On June 6, 1973, on the Petitioner's appeal to the United States Court of Appeals for the Second Circuit, the judgment of the District Court was affirmed on that date from the bench without opinion. The judgment of affirmance of the United States Court of Appeals for the Second Circuit is annexed hereto and marked Appendix A. On June 28, 1973, Petitioner's application for a rehearing on his appeal was denied without opinion. This order also is annexed hereto and marked Appendix B.

B. Jurisdiction.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented.

1. Does the Fifth Amendment mandate dismissal of the indictment obtained below since the prosecutor, an Assistant United States Attorney, was the only witness before the Grand Jury and his testimony was 100% hearsay of an available live witness?

2. Does the Fourth Amendment mandate dismissal of the indictment since petitioner, charged with a crime of which possession is an element, was denied standing to attack an illegal search and an evidentiary hearing ordered by the Circuit Court was a farce?

3. Since no one testified to any acts or conversations evidencing guilty knowledge on the part of petitioner, does this failure by the Government to prove the essential element of "knowledge" in the conspiracy count mandate

either dismissal of the indictment or a new trial for the petitioner?

4. Do the actions of the United States in forcing Paraguay to extradite petitioner constitute an "act of bad faith toward the government" of Paraguay and deny petitioner his liberty and freedom without due process of law as required by the Fifth Amendment?

5. Did petitioner receive a fair trial?

D. Constitutional Provisions, Statutes and Rules involved are as follows: This material is attached as Appendix C.

E. Statement of the Case.

The petitioner Auguste Joseph Ricord was convicted in the United States District Court for the Southern District of New York before the Honorable John M. Cannella and a jury on a one-count indictment charging conspiracy to violate federal narcotics laws 21 U.S.C. 173, 174, which laws have since been repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Petitioner was sentenced to imprisonment for a term of twenty years and a fine of $20,000.00 plus costs of prosecution.

Statement of Facts

The uncontradicted facts are that Auguste Joseph Ricord, who speaks no English, was resident in South America for some twenty years prior to this case without any criminal conviction. He had built a score of restaurants and had recently completed construction of the Paris-Niza Motel (named after the Paris-Nice Railway) in Asuncion, Paraguay.

In late 1970 some six individuals were arrested in Miami and New York by Federal Authorities after a large quantity of narcotics had been seized without a warrant from a parked, locked and tied down airplane at a local airport in Florida. Each of those arrested gave statements which did not implicate nor even refer to Mr. Ricord. In December of 1970 two of those arrested escaped from the Federal Detention Headquarters in New York City.

Some months later, after prolonged incarceration together and repeated questioning, two of the remaining prisoners agreed to cooperate with the Government. They changed their statements and identified a photograph of Ricord to a grand jury, as a result the original indictment naming Ricord as a defendant was obtained.

Mr. Ricord had never been in the territory of the United States, had violated no laws of Paraguay or Argentina, the two countries where he maintained residences and was not a fugitive. He had no record of arrests or convictions relating to narcotics.

A formal request for his extradition to the United States was denied by the Courts of Paraguay. This decision was later overturned as hereinafter set forth.

At trial in December 1972 in the Southern District of New York, Petitioner was convicted upon the testimony

of three alleged co-conspirators. Each of these witnesses was an admitted liar and narcotics smuggler of long duration. They had been arrested in the United States; they were all aliens; they were in jail facing serious criminal charges and long prison terms. There was no other evidence implicating petitioner in any way. Still further, there was no testimony as to any conversation in which petitioner referred to narcotics. One of the three witnesses testified that petitioner helped him carry innocent appearing luggage from a rented motel room at the Paris-Niza Motel to a car, and that such luggage contained the narcotics involved in this case. There was no other proof of any physical contact by petitioner.

This Courts attention is respectfully directed to the following significant procedural chronology of this case in the Southern District of New York.

1. *Defendant is brought to the United States* for the first time—September 3, 1972

2. Defendant first meets Herbert I. Handman, Esq. and retains him as counsel—September 11, 1972

3. A motion was made to recuse Judge Cannella

4. *The Superceding Indictment is filed*—October 3, 1972

5. Defendants pre-trial motions—October 13, 1972

6. *Particulars are furnished* by the government in four separate stages:

   October 17, 1972

   October 27, 1972

   October 31, 1972 and

   November 6, 1972

7. A further *written suppression motion* and memorandum of law is filed—November 15, 1972

8. Defense counsel goes to Paraguay to inspect place of alleged occurrances—November 18 through November 23, 1972

9. *Motion to take depositions* of witnesses in Paraguay is filed—November 28, 1972

10. *Application for adjournment of trial* is filed—November 28, 1972

11. Defense counsel goes to Paraguay to take depositions —November 30 through December 2, 1972

12. *Writ of Mandemus* is argued in Court of Appeals requesting adjournment of trial and hearing on suppression motion—December 4, 1972

13. *Trial commences*—December 4, 1972

TIME ANALYSES

Defendant in United States until trial—13 weeks

Indictment until trial—8½ weeks

Completion of Government's particulars until trial—3½ weeks

POINT I

The procedure by which the Indictment of Petitioner Ricord was secured, Constituted a Blatant Violation of the Fifth Amendment to the United States Constitution.

The Fifth Amendment provides among other things that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor be deprived of life, liberty or property without due process of law; * * *"

The only witness before the Grand Jury which returned the indictment in the instant case *was the Prosecutor,* Assistant United Sates Attorney Phillips.

His testimony was 100% hearsay.

The person whose hearsay he quoted was alive and readily *available to testify.*

The Petitioner's motions to dismiss the indictment due to the method employed in securing it were disposed of summarily by the Trial Court. The Government supports this action on the authority of *Costello* v. *United States,* 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956).

This only witness before the Grand Jury, Assistant United States Attorney Phillips, stated under oath:

> "The evidence presented to the grand jury which voted the superseding indictment consisted of the prior grand jury testimony of Felix Becker, an accomplice of Ricord's who testified before the grand jury which voted the original indictment. Becker's

> original testimony was identified by the court reporter who had taken it and was read to the grand jury by myself. In addition an affidavit sworn to by Becker and submitted "as part of the extradition papers was identified by an agent of the Customs Bureau and also read by me to the Grand Jury" (Affidavit of Assistant United States Attorney Phillips sworn to March 27, 1973).

The Felix Becker referred to in Phillips statement was readily available, being a Federal prisoner. Becker was one of the principal Government witnesses at the subsequent trial and that he would be such a witness was well known at the time of the grand jury proceedings above referred to.

Petitioner submits that *Costello* was never meant to cover a case such as this and that there is nothing in the *Costello* case which even remotely resembles the facts of the instant case.

If *Costello* does stand for the proposition that a prosecutor may go before a Grand Jury and secure an indictment by reading to that Grand Jury, an available living person's previous testimony before a different grand jury and an affidavit of that person, then *Costello* should be overruled.

Petitioner submits, however, that *Costello* does not stand for any such outrageous proposition.

There has been so much said and written about the *Costello* case and what it does or does not stand for that it is not amiss to go back and look at the actual facts of that case and what was really decided.

In the *Costello* case the indictment was based solely on the testimony of three agents who had investigated the financial transactions and expenditures of Costello

and his wife for the tax years of 1947, 1948 and 1949. These three agents testified at the trial and cross-examination developed the facts as to the grand jury presentation being technically hearsay and these three agents the only witnesses. At the *Costello* trial there were some 144 witnesses and 368 exhibits. After the proper groundwork had been laid by witnesses with first hand knowledge, these three agents had been permitted to take the stand and summarize the vast amount of evidence which had been produced.

The opinion of the Court delivered by Mr. Justice Black starts out with following statement:

> "We granted certiorari in this case to consider a single question: "May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?"

In view of the Courts affirmativve answer to this question the case has been used as a universal authority for the proposition that an indictment supported entirely by hearsay is a valid indictment and complies with the Fifth Amendment guarantee of an "Indictment by a Grand Jury."

However, nowhere does *Costello* hold or even intimate that indictments are inviolable to attack for lack of due process or other procedural or substantive defects of constitutional dimension. It has sometimes been referred to as doing so but the cases where this has happened turn on other points.[1]

---

[1] *Lawn* v. *United States*, 355 U.S. 339, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958). The question of hearsay was not even involved, rather the possible use of evidence secured in violation of a defendants constituional rights. The court found no basis, "beyond suspicion," for the defendant's challenge to the indict-

[Footnote continued on next page]

Perhaps one of the best appraisals of the *Costello* case is that of Judge Jack Weinstein in *United States* v. *Arcuri*, 282 F. Supp. 347 (E.D.N.Y. 1968), *aff'd*, 405 F.2d 39 (2d Cir. 1968):

> "There is no reason to believe that the Supreme Court in *Costello* intended to encourage the practice before grand juries of deliberately relying solely on the testimony of witnesses without any personal knowledge when better evidence is readily at hand. Rather, *Costello* seems to have been designed to avoid technical failures of indictments because hearsay or other inadmissible evidence was used either inadvertently or because nothing more probative was immediately available."

Mr. Justice Burton in his concurring opinion in *Costello* had this to say about the opinion of Mr. Justice Black:

> "I agree with the denial of the motion to quash the indictment. In my view, however, this case does not justify the breadth of the declarations made by the Court. I would assume that the Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. * * *."
>
> * * * * *
>
> "Here, * * *, substantial and rationally persuasive evidence apparently was presented to the grand jury. * * *."

---

ment. The reference to *Costello* was gratuitous and also inaccurate.

United States v. *Blue*, 384 U.S. 251, 86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966). Again the question of hearsay was not involved but the possible use of tainted evidence. A footnote to the opinion states: "It does not seem to be contended that tainted evidence was presented to the grand jury;" The footnote goes on to say that "this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether. See *Costello* v. *United States; Lawn* v. *United States.*"

The United States Court of Appeals for the Second Circuit has passed on the matter of the use of hearsay evidence before the Grand Jury in a long series of cases, whether from its supervisory authority or the due process clause of the Fifth Amendment or other mandates, the Court has over and over again warned the Government prosecutors that where live witnesses are available, the use of hearsay will not be further countenanced under pain of dismissal.[2]

The last case in this series, is *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972). In that case the conviction was reversed and the indictment dismissed. The following quotation from the opinion by Friendly, *C.J.*, sets forth the attitude of the Second Circuit toward the use of hearsay, p. 1136.

> "When the framers of the Bill of Rights directed in the Fifth Amendment that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,' they were not engaging in a mere verbal exercise. The importance of avoiding undue reliance upon hearsay before a grand jury, is heightened by this circuit's view that an indictment

---

[2] *United States* v. *Andrews*, 381 F.2d 377 (2d Cir. 1967); *United States* v. *Payton*, 363 F.2d 996 (2d Cir. 1966); *United States* v. *Heap*, 345 F. 2d 170 (2d Cir. 1965); *United States* v. *Beltram*, 388F. 2d 449 (2d Cir. 1967); *United States* v. *Borelli*, 366 F.2d 376 (2d Cir. 1965) *cert. denied* under name *Cinquigrano* v. *United States*, 379 U.S. 960, 85 S. Ct. 647, 13 L. d. 2d 555); *United States* v. *Messina*, 388 F. 2d 393, (2d Cir. 1968) *cert. denied* 390 U.S. 1026 88 S. Ct. 1413, 20 L. Ed. 2d 283; *United States* v. *Umans*, 368 F.2d 725 (2d Cir. 1966) *cert. denied* 389 U.S. 80 88 S. Ct. 253, 19 L. Ed. 2d 255 (1967); See also *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964).

> constitutes a finding of probable cause and avoids the need for a preliminary hearing under F. R. Cr. P. 5(c). *Sciortino* v. *Zampano*, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906, 88 S. Ct. 820, 19 L. Ed. 2d 872 (1968)."

The vice here is not just that hearsay was used to secure the indictment. The vice here is that taking into consideration the procedural and substantive laws and decisions in the Second Circuit, petitioner has been denied due process of law and a right to a fair trial.

As Judge Weinstein said in his decision in *United States* v. *Arcuri, supra,* in condemning the use of hearsay:

> "The second reason the practice is undesirable is that it prevents the defendant from utilizing grand jury testimony in cross-examining witnesses who will testify at the trial. Since no witness the government intends to use is called before the grand jury, it avails a defendant little to have the grand jury testimony furnished to him at the trial. * * *.
>
> "When a government witness testifies, and defense counsel seeks his grand jury testimony for use in cross-examination, he is met with the answer that the witness did not testify before the grand jury. Taken with the concurrent prosecution tactic of avoiding preliminary hearings * * * the net effect is to cut the defendant off from material which should be available to him as a partial substitute for discovery proceedings."
>
> * * * * *
>
> "We are informed that the practice challenged in the present case no longer represents the policy of the United States Attorney in this district and that witnesses with personal knowledge are now relied upon wherever possible. * * *."

> "Accordingly a timely motion to dismiss an indictment handed down after [this week] will be granted without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury. * * *."

Section 102(d) of the Organized Crime Control Act places the recorded grand jury testimony within the definition of the term "statement" under subsection (e) of the Jencks Act. It would be hard to conceive of a more blatant way of nullifying this statute than to do what was done in the instant case.

In the Second Circuit the grand jury testimony of any government trial witness has been made available since the decision of the Court of Appeals in that Circuit in *United States* v. *Youngblood,* 379 F.2d 365 (2d Cir. 1967) which contained a prospective direction to that effect.

The method used by the prosecution in the instant case also was in direct contravention of the mandate of the *Youngblood* case.

Unless this Court intervenes to dismiss the indictment in the instant case, it is easy to imagine what will happen.

All a prosecutor will have to do is to go before a Grand Jury and tell that Grand Jury what his prospective government witnesses are going to testify to at the trial.

The whole Grand Jury proceeding will become a farce and the Fifth Amendment guarantee of a Grand Jury Indictment and due process of law will have been wiped out by a clever prosecution manoeuver.

In the instant case, the prosecution furnished as 3500 or Jencks Act material the prior grand jury testimony and

affidavits which had been read to this indicting Grand Jury by Assistant United States Attorney Phillips, as they undoubtedly came within the statutory requirement. This provided the defense with some impeachment and cross-examination background.

This fact, however, does not alter the vice and unconstitutionality of the procedure followed in the instant case. The indicting grand jury was precluded from asking any questions of Becker as might very well have happened had he been live before them. Furthermore, if the procedure followed in the instant case is not overturned, the next step will be for the prosecution to make sure that it carefully avoids having any material which comes within the Jencks Act.

The Government's bald and open position is that the method of securing the indictment in this case is authorized by *Costello* and within the guidelines set by the Court of Appeals for the Second Circuit.

It must be remembered that the *Arcuri* case, *supra,* was affirmed by the Second Circuit. Subsequently in *United States* v. *Liebowitz,* 420 F.2d 39 (2d Cir. 1969), that court stressed that:

> "* * * We admonished prosecutors regarding the over-use of hearsay evidence in the presentation of government cases to grand juries, but we have consistently upheld indictments based upon hearsay evidence, * * * even though use of hearsay before the grand jury deprives a defendant of the opportunity to impeach witnesses at trial with prior inconsistent statements made to the grand jury. * * * Indictments obtained principay or wholly upon the basis of hearsay evidence, even though direct testimony was available, will not be dismissed unless it appears that dismissal is required to protect the integrity of the judicial process."

The court goes on to give some examples of protection of the judicial process. One is where "the grand jury is misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed" (p. 42). See also *United States* v. *Payton*, 363 F.2d 996, 988-999 (2d Cir. 1966). Another example is where the defendant can show a high probability that with eye-witness as against hearsay there would have been no indictment.

In the instant case the Government in its brief before the Circuit Court makes the following flat statements:

> "The rule in this Circuit, however, is that indictments obtained wholly on hearsay evidence will not be dismissed *unless*" (and then goes on to quote one of the example referred to above from the *Leibowitz* case).
>
> "the grand jury is misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed."

This use by the Government in the instant case of *Leibowitz* is completely unjustified and indicates the extent to which the prosecutor is willing to try and stretch the *Costello* case. What Leibowitz said is

> "*unless it appears that dismissal is necessary to protect the integrity of the judicial process.*"

Petitioner submits that this instant case is such a case. The only grand jury witness was the Assistant United States Attorney prosecuting the case—the only evidence was his hearsay reading of statements of a readily available government witness of crucial importance.

In considering the integrity of the judicial process, let us not forget that the Fifth Amendment of the United States Constitution is still in force and as Honorable Judge Friendly said in the *Estepa* case "When the framers of the Bill of Rights directed in the Fifth Amendment that 'no person shall be held to answer for a * * * crime, unless on a presentment or indictment of a Grand Jury', they were not engaging in a mere verbal exercise."

This matter is of great importance beyond the question of material for cross-examination and impeachment of government witnesses by defense counsel. As Honorable Judge Weinstein said in the *Arcuri* case, *supra*:

> **"The practice, as in the instant case of relying on hearsay rather than upon the testimony of eye witnesses is pernicious for two reasons. First, it habituates the grand jury to rely upon 'evidence' which appears smooth, well integrated and consistent in all respects. Particularly because neither cross-examination nor defense witnesses are available to them, grand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of honest observers of the events. Thus, they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its function as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where, technically a prima facie case may have been made out. It is, moreover, unlikely to demand additional evidence."**
>
> **(The second reason is quoted above practically *in extenso*, at page 12).**

Finally, if there is any constitutional basis for the Second Circuits' Rule about the use of hearsay before the Grand Jury, whether in the specific language of the Fifth Amendment or the "due process" clause, or otherwise, the method of securing this indictment clearly violated that Rule.

And last but not least, to uphold the procedure openly and admittedly used by the prosecutor is to abolish the Fifth Amendment requirement of an Indictment—for what happened here is nothing more nor less than an information read to the Grand Jury and rubber stamped.[3]

---

[3] Petitioner will not attempt to set forth the statistics and authorities as to the "rubber stamp" quality of the Grand Jury today. The legal peridoicals are filled with articles which can best be summed up by the remark of an anonymous trial lawyer that a prosecutor could persuade a Grand Jury "to indict an asthmatic for sneezing." Oaks and Lehman. *A Criminal Justice System and the Indigent*, 44 n. 75a (1968).

POINT II

The warrantless searches and seizures of the drugs were in violation of the Fourth Amendment and the denial of the suppression requires reversal of the conviction.

The chronology of the events leading up to an evidentiary hearing which was held at the beginning of the trial is important as bearing on the Trial Court's questionable conduct and also the merit of the motions.

A motion to dismiss the indictment on the basis of the illegal search and a motion to suppress were both made pre-trial.[4] These motions were denied by the Trial Court on the basis that petitioner lacked standing.

After the Government's Bill of Particulars on October 27, 1972, stating *"The heroin was the property of Ricord"*, petitioner renewed the motions in writing on November 15, 1972 accompanied by a memorandum of law and asked for an evidentiary hearing (Appendix E). The Government opposed such a hearing pre-trial and urged by affidavit of November 20, 1972 that any evidentiary hearing on the illegality of the search and seizure be held post-verdict (Appendix F).

The Trial Court acceded to the Government's request and set the trial date for December 4, 1972. Petitioner applied to the Circuit Court of Appeals for a mandamus to the Trial Court to hold a pre-trial as opposed to a post-verdict so-called "taint hearing" and a stay of the trial (Appendix H).

---

[4] At the time the first motions were heard on October 16, 1972, the Government had not furnished the Bill of Particulars of October 27, 1972 in which it uniquovocally took the position that the heroin seized belonged to Petitioner, nor had Petitioner been informed there were two searches and seizures not one.

On December 4, 1972 the morning when the trial was to commence, the Circuit Court directed the Trial Court to hold such an evidentiary hearing pre-trial. That same day the Second Circuit put a stop to the vicious and questionable practice of reserving the determination of such pre-trial motions until after the jury verdict of guilty.[5]

Although petitioner's counsel had in his motion papers set forth various witnesses and documentary evidence which would be material and relevant to such an evidentiary hearing, the Trial Court, after being informed of the action of the Circuit Court, refused to give the defense

---

[5] In *United States* v. *Birrell*, 470 F.2d 113 (2d Cir. 1972) decided the same day December 4, 1972, the Circuit Court reversed a conviction of Birrell with instructions to dismiss the indictment. The following excerpt from the Courts opinion covers this matter fully (709):

> "Birrell's principal contention on appeal is that the initial lead which induced the Government to subpoena the witness and documents used at trial was obtained in a manner violative of the search and seizure provision of the Fourth Amendment. No hearing was held on Birrell's motion to suppress; rather each side submitted affidavits, on the basis of which the judge ruled that no hearing was necessary since he could reconsider the matter and grant a hearing, if this seemed desirable, in the event of a conviction. When a motion to suppress has been made prior to trial, we do not approve such an extension of the practice of postponing a "taint" hearing until after verdict, which was devised by the late Judge Herlands to meet the exceedingly hard problem confronting him in another prosecution of the appellant, *United States* v. *Birrell*, 269 F. Supp. 716 (S.D.N.Y. 1967); in such cases there may indeed be serious difficulties in conducting a "taint" hearing until the court knows what evidence the Government will offer. Here the issue was not "taint" but the legality of the search. It was clear, as the Government conceded at argument, that if the search was illegal, all the evidence with respect to Birrell's employment to be offered at trial would be tainted."

Curiously enough the prosecutor in the Birrell case was the same Phillips that prosecuted the petitioner.

time to prepare for such hearing. On the contrary, immediately the same morning of the 4th of December, 1973, the Trial Court commenced what was termed by his Honor the hearing required by the Circuit Court's direction which occurred an hour or so earlier. Three Government agents then available in New York testified .

The hearing was adjourned to December 5, 1972 at 9:00 A.M. at which time two Government agents were to be present. Other witnesses were requested by the defense, who were not then available. Symptomatic of the Trial Court's reaction to the direction to have the evidentiary hearing prior to the trial was the comment when the anonymous letter which triggered the investigation which resulted in the search and seizure was produced.

> "Mr. Handman: Your Honor, this is going to take me a few minutes to digest.
>
> The Court: Go ahead and digest it. I can wait. I have been waiting on you before, so there is no reason I can't wait now."

The morning of December 5, 1972, the evidentiary hearing witnesses did not show up. The court immediately proceeded with the selection of the petit-jury, which was empaneled and sworn and luncheon recess declared. After lunch both the Government and defense, pursuant to the direction of the Trial Court, opened. A recess was then taken and the court in the absence of the jury reopened the evidentiary hearing on the motion to suppress. One Bianchi, the pilot of the airplane, which was the subject of the search, was called as a witness. Bianchi was accompanied by an attorney. Bianchi refused to testify after what petitioner submits was in substance the suggestion of the Trial Judge and at least inferentially an arrangement

with the prosecutor. The Trial Judge refused to allow the defense to ask Bianchi a single question (Appendix D).[6]

Not until January 29, 1973, the day of the sentencing of the petitioner, did the Trial Court become sufficiently concerned about the illegality of the search and seizure to write an opinion to bolster the almost incredible conduct of the Trial Court and the prosecution with respect to this matter (Appendix G). It is possible that this opinion of January 29, 1972 was thought necessary in the light of petitioner's motion for a new trial filed January 22, 1973, after the jury verdict and prior to sentencing.

The Trial Court's opinion with respect to the motion to suppress is almost as ludicrous as the evidentiary hearing.

To begin with the opinion states (page 4 Appendix G):

> "At the outset, the court finds that the defendant lacks standing to challenge the validity of the search."

There follows a citation of cases which in no way support this holding if it is one.

---

[6] This same Bianchi on December 5, 1972 at the time of his refusal to testify was a co-defendant who had confessed and the Government had prepared him to testify as a witness against petitioner. The very next day he did so testify. The trial of his case was severed on the motion of the Government on December 5, 1972. A more flagrant abuse of the required conduct of a prosecutor could scarcely be found. Especially in the light of *Olmstead* v. *United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). It is also significant that the refusal of the trial judge to permit defense counsel to ask any questions of Bianchi is clearly violative of the law. *United States* v. *Saewald*, 450 F.2d 1159 (2d Cir. 1971), *cert. denied*, 405 U.S. 978. *California* v. *Byers*, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971).

Petitioner submits that it is an imposition on the time of the court to argue this point as the Trial Court in effect admitted the completely fatuous character of this position by granting and holding an evidentiary hearing. Especially so, since the Government's Bill of Particulars asserted as set forth above that the seized heroin was the property of petitioner.

United States v. *Jeffers,* 342 U.S. 48 (1950);

Jones v. *United States,* 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960);

Wong Sun v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963);

Alderman v. *United States,* 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969);

F.R.C.P., Rule 41.

The Trial Court in its opinion went on to support the warrantless searches and seizures on the following grounds:

1. Probable cause.
2. A border search.

Fortunately for the petitioner this Court on June 21, 1973, decided the case of *Sanches* v. *United States,* Docket N. 71-6278 involving an analogous situation.

The opinions in that case discuss in detail warrantless searches and so-called border searches.

The net effect of that case and all of the opinions concurring and dissenting is that no mater what the circumstances may be, if a search warrant can be secured without any possibility of loss of the opportunity to effect the search, the Fourth Amendment requires a warrant.

The petitioner submits that in this case, there was adequate opportunity to secure a warrant and no excuse for not doing so.

The facts are clear and unequivocal and it is the facts which control, not wishful thinking or excuses.

The facts are as follows:

The narcotics which were the basis of petitioner's prosecution were seized after a warrantless search of a CESSNA airplane by agents of the Government. This warrantless search and seizure took place at North Perry Airport, a small local airport near Miami, Florida. This plane had been under constant surveillance since its arrival at Miami International Airport the previous day. After the plane arrived at North Perry, it had been blocked, tied down and locked. Upwards of ten armed agents (F.B.I., B.N.D.D. and Customs) staked out the airplane and such stake out was continued until the search and seizure which took place some 16 hours later. During the stake out an inspection of the plane by one of the agents had disclosed the presence of the three valises later seized from the airplane and which valises contained the narcotics involved. No effort was ever made to secure a warrant.

The Trial Judge undertook to support this search and seizure in his belated January 29, 1973 opinion on the following grounds:

> "In any event, the court finds the search to be legal and valid in all respects. It was conducted with probable cause and was not unreasonable. From the totality of the knowledge possessed by the Customs Agents and others, there was sufficient probable cause to conduct the search. It was reasonable for them to assume that the aircraft was smuggling narcotics into the United Stats. The court is not persuaded that a search warrant should have been obtained even

> though there is evidence that the plane was parked and its wheels chocked with lines attached.[3] We are not concerned here with the search of a house or even a motor vehicle, but with a speedy, not readily pursuable light aircraft that could with ease take off and disappear possibly to Cuba or some other caribbean Island."
>
> • • • • •
>
> "3. although the aircraft was secured in this fashion, it could easily have been freed in a matter of seconds. See Hearing Minutes, p. 60."

Even were the factual assumptions correct this reasoning of the Trial Court is obviously rationalization, for with the stake out, if there had been any effort to move the airplane, those making such an effort could have been arrested with probable cause and any such movement of the airplane prevented.

There just is no excuse for the agents not having secured a search warrant.

The Trial Court in a further effort to bolster the legality of the seizure said (Appendix G, p. 6):

> "Furthermore, the court concludes that the agents conducted a valid border search."

The Court went on to cite 19 U.S.C. Section 482 and various border search cases, carefully omitting *United States* v. *Almeida Sanches,* 452 F.2d 459 (9th Cir. 1971) where certiorari had been granted by this court but not yet heard or decided, 406 U.S. 944.

The *Sanches* case has now been heard and decided (Docket No. 71-6278, June 21, 1973) and petitioner submits is dispositive of this question of the necessity of a search warrant in this case.

Any search to qualify as a border search would have had to take place at Miami International Airport, which was the functional equivalent of the border.

Once this airplane was in the interior of the United States parked at the local North Perry Airport, any search and seizure is governed by the legal principles so carefully discussed and analyzed in *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

Whatever else may or may not be argued or urged, the wholly inexplicable failure of the agents to secure a Search Warrant condemns the search and seizure here involved and requires a reversal of the conviction.

Before leaving this point petitioner wishes to allude to the Trial Court's procedure in interrupting the suppression evidentiary hearing to empanel the trial jury, and insisting on the openings. Taken together with the constant pressure on defense counsel to proceed without time to make reasonable arrangements for witnesses, etc., petitioner submits that the whole matter of the evidentiary hearing was a farce as the Trial Judge had prejudged the question and reluctantly went through the motions of an evidentiary hearing only because of the direction of the Circuit Court.

POINT III

Since no one testified to any acts or conversations evidencing guilty knowledge on the part of petitioners the Government failed to prove the essential element of "knowledge" in the count of conspiracy to violate Title 21, U.S.C. §§ 173, 174.

To sustain a conviction for conspiracy to violate Title 21, U.S.C. §§ 173, 174 it is necessary to prove knowledge. *Ingram* v. *United States,* 360 U.S. 672, 678, 79 S. Ct. 1314, 1319, 3 L. Ed. 2d1503 (1959) ("conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense"), *United States* v. *Lasalandra,* 421 F.2d 1261 (2d Cir., 1970), cert. denied, 398 U.S. 931. Section 174 contains an extraordinary provision which allows the Government to make out a prima facie case without the necessity of proving knowledge directly: the jury *may* (emphasis added) draw an inference of knowledge from the mere fact of possession of the proscribed narcotic, unless the defendant otherwise explains the possession to the jury's satisfaction.

In the instant case there is not a shred of proof in the record that the petitioner ever knew that the substance which he allegedly conspired to import was heroin. No witness had any conversation with petitioner in which narcotics or heroin was alleged to have been mentioned. Indeed one of the main conspirators, a prosecution witness, says that he learned that his own activities involved heroin only shortly before his arrest, well after his arrival in this country and long after his last contact with petitioner.

In *United States* v. *Febre,* 425 F.2d 107 (2d Cir., 1970), cert. denied, 400 U.S. 849, the defendant had been convicted of violating § 174, and of conspiracy to violate § 174.

The defendant conceded that the evidence sufficed to prove that he had facilitated the transportation of heroin, but claimed that there was no proof of knowledge, and no proof of possession. The Court of Appeals reversed those counts as to which the only evidence was that the defendant was in an apartment with another conspirator who subsequently emerged with heroin. The Court said that in such a case there was no "possession", actual or constructive, and listed the indicia of "constructive possession" as follows:

> "Properly admitted evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to the means of transfer, or was able to assure delivery" (at page 111).

Not even one of these requirements is present. It is nowhere contended that this petitioner did any of these in respect to the narcotics involved in this case. The Court held further that "possession, actual or constructive, must be shown with respect to each individual conspirator," 112 (Quoting in last case from *United States* v. *Hernandez,* 290 F.2d 86 (2d Cir. 1961). Possession of a co-conspirator cannot impute possession to defendant.

In *United States* v. *Steward,* 451 F.2d 1203 (2d Cir., 1971), the defendant communicated details of a plan to sell heroin to a "buyer" who was a Government informer, and was convicted of conspiracy to violate § 174. The Court found no possession and therefore no knowledge, since the defendant, who was in jail at the time of the transaction, did not have "power to control the disposition of the drugs such as to constitute constructive possession." The defendant was found to be a "mere casual facilitator," and the conviction was overturned.

In *United States* v. *Steward,* 451 F.2d 1203 (2d Cir., 1971), the Court overturned the defendant's conviction under §§ 173, 174, and conspiracy to violate § 174. The

defendant was the armed chauffeur of the car which transported a third party carrying heroin on his person to the place of sale. Yet this degree of association was found not to constitute constructive possession.

The Government here contended at pages 29 and 30 of its brief to the Court of Appeals that the petitioner's knowledge of the heroin was "overwhelming" citing

a) its being removed from a motel room at a hotel where appellant was working;

b) the "amount of heroin involved";

c) a conversation between appellant and the witness who testified that he (the witness) did not know that heroin was involved in the conversation; and

d) alleged observation of the receipt of funds by appellant from another person charged as a co-conspirator which is said to have taken place in Paraguay without the witness being able to hear any of the conversation.

It is respectfully urged that these indices characterized as "overwhelming" by the Government do not comply with the legal requirements heretofore imposed on prosecutions under this law.

POINT IV

The actions of the Government of the United States in forcing Paraguay to extradite petitioner was an "act of bad faith toward the Government" of Paraguay, which "entails international consequences", and violates "a rule of what we would now call United States foreign relations law devised by the courts."

Upon receiving and considering a formal request for extradition, the Paraguayan court rendered its opinion denying extradition in which it stated the following:

> "Since the offense of dealing with drugs and narcotics is not explicitly included in the Treaty, that agreement cannot well be invoked by one of the parties to demand the extradition of the person . . ."
>
> "It is necessary that the criminal act that constitutes the ground for the persecution be considered such not only by the laws of the country where it was committed, but also by those of the State where the Court exercises its functions (lex fori)."
>
> "The second requirement set forth by the Treaty is that the OFFENSE HAD BEEN COMMITTED WITHIN THE JURISDICTION OF ONE OF THE CONTRACTING PARTIES AND PROVIDED THE PERSON WHOSE EXTRADITION IS REQUESTED WAS ACTUALLY IN THAT JURISDICTION AT THE TIME THE OFFENSE WAS COMMITTED:"
>
> "The accusations emanating from Becker and Gahou are devoid of value in the pursuit of the case in accordance with our laws inasmuch as they accuse Auguste José Ricord of participation, in view of the fact that both are under detention. In fact,

> according to our laws, the co-accused are under no circumstance requested to make statements under oath nor to promise to state the truth (Article 196 of the Code of Criminal Procedure)."
>
> " 'To be free men we must be slaves to the law' " (Appendix, pages 67-89).

Petitioner has offered to prove that the United States Executive bribed [7] and extorted the Government of Paraguay to subvert this holding of its judiciary. The extradition of this petitioner was thus obtained by forcing the courts of Paraguay to succumb to economic and political pressure wholly foreign to every principle of American justice and respect and obedience to the law, both domestic and foreign.

In *Fiocconi* v. *Attorney General of United States*, 462 F.2d 475 (2d Cir., 1972) the court set forth its position with regard to extradition in cases that affect the courts, laws or policies of foreign governments.

Preliminarily, the court noted and reiterated a universally accepted principle when it stated that the

> ". . . [T]he Italian Government could grant extradition as an act of comity when the offenses for which this was requested were also crimes under the law of Italy, provided that the relevant treaty did not prohibit extradition for the offenses in question (which the American-Italian Convention did not), and that the offenses with which Fiocconi and Kella had been charged in the United States were in fact crimes under Italian law . . . " (at page 477).

---

[7] A special presidential envoy admitted his meetings and conversations with both the President of Paraguay and members of its judiciary in this regard. He is Nelson Gross, and is presently under indictment in the Federal District Court in the State of New Jersey charged with similar acts.

After considering this problem in depth, Judge Friendly, in the *Fiocconi* opinion, says, "the Court developed a rule of law providing . . . a judicial remedy for . . . violation of international law" and clearly indicated that this Court would not suffer actions which "violated a rule of what we would now call United States foreign relations law devised by the courts to implement the treaty" (at page 479).

In *Fiocconi,* the court had to determine whether a prosecution of defendant for another offense, similar to the one for which defendant was properly extradited, violated this rule. The holding was that it did not.

However in reaching this conclusion this Court considered every facet of the case and justified its conclusion on the following stated grounds, *inter alia,* to wit:

> "That the language of the treaty itself supported the finding of this Court (page 481)."

Now, this Court is respectfully urged to recognize the very existence of the "United States foreign relations law" and demand inquiry into the facts as they might reflect compliance with its mandates.

If such a body of law is extant and its concern is that "a breach of faith by the receiving government entails international consequences," one can only conclude that this Court will exercise concern that extortion and force constitute a breach of faith with respect to the presentation of causes to foreign courts.

Petitioner submits that over and above this Rule of Foreign relations law, the Fifth Amendment due process clause is involved and was clearly violated.

The extradition here effected was a judicial proceeding commenced in this country by the original Grand Jury Indictment. Every step in that judicial proceeding including

the request for extradition to the Paraguayan Government is subject to review by the courts of this country in order to assure that the person being prosecuted will not be deprived of his liberty without due process of law.

We must accept as fact the petitioner's proffer of proof in this case:

> *"That the United States bribed and extorted the Government of Paraguay to effect the reversal of the Paraguayan Court's determination denying extradition."*

To ask the question whether this conduct was "due process of law" is to answer it.

Petitioner had been deprived of his liberty by illegal and immoral acts, committed by the United States.

It matters not what Branch of the United States Government committed these acts. They were committed in the course of and as part of the prosecution of petitioner and the prosecution must take the full responsibility for such improper and illegal conduct, for the United States Government is an entity and can not be compartmentalized. *United States* v. *Giglio,* 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

POINT V

The conduct of the Trial Judge and the prosecution denied petitioner a fair trial and effective assistance of counsel.

At the outset, petitioner reluctantly must point out that the Trial Judge was scheduled for a serious eye operation in date December or early January. In all fairness, the trial of this case should have been adjourned until after the operation so as to give petitioner an opportunity to properly defend himself. The refusal of requested adjournments deprived petitioner of effective assistance of counsel and this factor plus the conduct of both the Trial Judge and the prosecutor combined to deny petitioner a fair trial. The matter of the improper denial of reasonable time to prepare is covered in petitioner's application to the Circuit Court of Appeals (Appendix H). The matter of the Trial Judge's conduct is summarized as follows:

(1) Counsel for the defendant was forced to take depositions in Paraguay in the week before trial or *to waive testimony of these witnesses.*

(2) Counsel for defendant was obliged to proceed to trial in less than three months—less than one month from date of completion of Bill of Particulars by United States Attorney.

During this time counsel made two trips to Paraguay which entail about 20 hours enroute each way.

(3) Although permission was granted to interview incarcerated witnesses just prior to trial, counsel was unable to do so due to the taking of depositions as set forth above.

(4) At voir dire the Court refused to ask specific questions as to whether jurors had read desig-

nated local and national publications which had carried extensive articles and prominent photographs of the defendant.

(5) The Court continually made comments disparaging counsels knowledge and handling of the trial; as for example "that's what you get when you ask a witness 'why'"

(6) The Court refused to permit any continuing objections even when the testimony and the objector were the same and repeated. In one instance counsel was thus forced to object to 30 questions in a row.

(7) The Court made different and inconsistent rulings on the admission of evidence all in favor of the prosecution. Most important were the following:

Through an arresting officer, the Government introduced over objection an ordinary business card of one Nick Giannatasio taken at random from several cards on his person when he was arrested in February of 1971, which had on it the same telephone number that one of the witness (Gahou) said was told to him by the defendant some ten months earlier in Paraguay.

There was no testimony that either the witness or the defendant had ever seen the card nor that it was even in existence at the time of the defendant's alleged conversation.

Later in the trial the defense offered deposit slips kept in the regular course of business by an international bank, through the testimony of an officer of the bank, which indicated that the alleged co-conspirators had deposited for transfer to Paraguay over $70,000. At the same time they testified to have received $107,000 for the sale of narcotics in New York and the carrying by hand of $100,000 in cash to Paraguay by commercial airlines. This evidence is not only inconsistent with the alleged [illegible] a different method of

The Trial Court admitted the business card of Giannatasio as referred to above and then surprisingly refused to admit the bank deposit slips on the stated grounds that the alleged co-conspirator who made the deposits was not a witness at the trial. Of course, Giannatasio was also not a witness.

The significance of these two offers of solid evidence in a trial consisting for the most part of unsupported testimony of admitted lawbreakers should not be overlooked, as indeed, the business card was requested during their deliberations by the jury.

(8) The Trial Court refused to grant evidenciary hearings on any motions including those respecting jurisdiction and the grand jury proceeding. It was only after a mandamus proceeding to the Court of Appeals, that a partial hearing was granted regarding the warrantless seizure of the evidence.

(9) Although the Court rejected the pre-sentence report of the probation department as improper and highly prejudicial, the Court imposed the maximum sentence permissible without benefit of a proper pre-sentence report.

(10) During the pre-trial hearing on suppression which the Court reluctantly granted to a limited extent, the Court permitted the main witness to claim the Fifth Amendment without even taking the stand, thus preventing counsel from posing a single question to this witness whether such questions might subject him to incrimination or not.

Still further, this same witness who claimed the right not to incriminate himself upon the suppres-

nated local and national publications which had carried extensive articles and prominent photographs of the defendant.

(5) The Court continually made comments disparaging counsels knowledge and handling of the trial; as for example "that's what you get when you ask a witness 'why'"

(6) The Court refused to permit any continuing objections even when the testimony and the objector were the same and repeated. In one instance counsel was thus forced to object to 30 questions in a row.

(7) The Court made different and inconsistent rulings on the admission of evidence all in favor of the prosecution. Most important were the following:

Through an arresting officer, the Government introduced over objection an ordinary business card of one Nick Giannatasio taken at random from several cards on his person when he was arrested in February of 1971, which had on it the same telephone number that one of the witness (Gahou) said was told to him by the defendant some ten months earlier in Paraguay.

There was no testimony that either the witness or the defendant had ever seen the card nor that it was even in existence at the time of the defendant's alleged conversation.

Later in the trial the defense offered deposit slips kept in the regular course of business by an international bank, through the testimony of an officer of the bank, which indicated that the alleged coconspirators had deposited for transfer to Paraguay over $70,000. At the same time they testified to have received $107,000 for the sale of narcotics in New York and the carrying by hand of $100,000 in cash to Paraguay by commercial airlines. This evidence is not only inconsistent with the alleged hand delivery but shows a different method of money transfer entirely.

The Trial Court admitted the business card of Giannatasio as referred to above and then surprisingly refused to admit the bank deposit slips on the stated grounds that the alleged co-conspirator who made the deposits was not a witness at the trial. Of course, Giannatasio was also not a witness.

The significance of these two offers of solid evidence in a trial consisting for the most part of unsupported testimony of admitted lawbreakers should not be overlooked, as indeed, the business card was requested during their deliberations by the jury.

(8) The Trial Court refused to grant evidenciary hearings on any motions including those respecting jurisdiction and the grand jury proceeding. It was only after a mandamus proceeding to the Court of Appeals, that a partial hearing was granted regarding the warrantless seizure of the evidence.

(9) Although the Court rejected the pre-sentence report of the probation department as improper and highly prejudicial, the Court imposed the maximum sentence permissible without benefit of a proper pre-sentence report.

(10) During the pre-trial hearing on suppression which the Court reluctantly granted to a limited extent, the Court permitted the main witness to claim the Fifth Amendment without even taking the stand, thus preventing counsel from posing a single question to this witness whether such questions might subject him to incrimination or not.

Still further, this same witness who claimed the right not to incriminate himself upon the suppres-

sion hearing, had some three months earlier fully confessed to his alleged part in the conspiracy and on the very next day testified at length for the prosecution incriminating himself with any reservation whatever.

(11) The Court refused a twenty-four hour adjournment for an important defense witness to arrive from Argentina.

(12) The Court permitted the prosecutor in his summation to compare appellant to Martin Borman. (At the time of trial these were repeated local press reports about Borman being found in South America and linking this appellant to German activities).

CONCLUSION

The essence of justice is largely procedural. Time and again, thoughtful judges have emphasized this truth.

Mr. Justice Frankfurter: "The history of liberty has largely been the history of procedural safeguards." *McNabb* v. *United States,* 318 U.S. 332, 347, 63 S. Ct. 608, 616, 87 L. Ed. 819 (1943).

Mr. Justice Jackson: "Procedural fairness and regularity are of the indispensable essence of liberty." *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, 224, 73 S. Ct. 625, 635, 97 L. Ed. 956 (1953).

See, also, Point IV, *infra* herein, wherein the Paraguayan court initially rendered its opinion denying extradition and stated: "To be free men we must be slaves to the law" (Appendix, pp. 67-89).

As was well stated in *Wilson* v. *United States,* 250 F.2d 312 in commenting on this Court's decision and rationale in *Bollenbach* v. *United States,* 326 U.S. 607:

> "It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty—our system demands he be found guilty in the right way . . ."

This case received wide press and other media coverage not only in the United States but more particularly in South America and Europe.

Citizens of this country have always boasted of the integrity of the administration of justice in United States and the fairness of its trials.

It is respectfully submitted by the petitioner that his prosecution does not come up to the high standards which are the heritage of this country and should be maintained.

Respectfully submitted,

Dated: New York, New York
August 27, 1973

HERBERT IRA HANDMAN
Attorney for Petitioner
36 West 44th Street
New York, N. Y. 10036
Tel. (212) 986-5460

INDEX TO APPENDIX

	PAGE
Appendix "A"	1a
Appendix "B"	3a
Appendix "C"	4a
Appendix "D"—Stenographer's Minutes, Dated December 5, 1972	7a
Appendix "E"—Motion to Suppress—November 15, 1972	12a
Appendix "F"—Affidavit Opposing Motion to Suppress	18a
Appendix "G"—Decision on Motion to Suppress, February 29, 1973	20a
Appendix "H"—Notice of Hearing on Petition for Writ of Mandamus	25a
Petition for a Writ of Mandamus	27a
Appendix "I"—Application for Adjournment	34a
Appendix "J"—Extradition Treaty—Paraguay	41a

APPENDIX "A"

United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of June, one thousand nine hundred and seventy-three.

Present: HON. PAUL R. HAYS,
HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
Circuit Judges,

73-1274

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

AUGUSTE JOSEPH RICORD, a/k/a ANDRE RICOR a/k/a MONSIEUR ANDRE, CESAR BIANCHI, JULIO RODRIGUEZ, JUAN DE DIOS RODRIGUEZ-BENITOZ, a/k/a ARON MURAVNIK and ENIO ANIBAL VARELA-SEGOVIA,
Defendants,

AUGUSTE JOSEPH RICORD, a/k/a ANDRE RICOR, a/k/a MONSIEUR ANDRE,
Defendant-Appellant.

Appendix "A"

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the twenty-eighth day of June, one thousand nine hundred and seventy-three.

Present: HON. PAUL R. HAYS,
HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

Docket No. 73-1274

UNITED STATES OF AMERICA,
Plaintff-Appellee,

—v.—

AUGUSTE JOSEPH RICORD, a/k/a ANDRE RICOR a/k/a MONSIEUR ANDRE, CESAR BIANCHI, JULIO RODRIGUEZ, JUAN DE DIOS RODRIGUEZ-BENITOZ, a/k/a ARON MURAVNIK and ENIO ANIBAL VARELA-SEGOVIA,
Defendants,

AUGUSTE JOSEPH RICORD, a/k/a ANDRE RICOR, a/k/a MONSIEUR ANDRE,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX "C"

(Constitutional Provisions, Statutes and Rules Involved)
Fourth Amendment:

The Fourth Amendment of the Constitution of the United States provides:

> **"The right of the people to be secure in their perons, houses, papers and effects, against unreasonable search and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."**

Fifth Amendment:

The Fifth Amendment of the Constitution of the United States provides:

> **"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."**

Title 28, United States Code, Section 1254(1)

Section 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions.

> **"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:**

Appendix "C"

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Title 21, United States Code, Section 173

Title 21, United States Code, Section 174

Rule 19, Supreme Court Rules

Rule 19, Considerations governing review on certiorari.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far

departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

"2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

Rule 41, Federal Rules of Criminal Practice

APPENDIX "D"

Stenographer's Minutes, Dated December 5, 1972

The Court: This concludes the openings, and before we go on to the taking of testimony we will take a five minute recess. Please don't discuss the case in the meantime.

(The jury left the courtroom.)

The Court: At this point the Court is reopening the hearing because I understand that Bianchi is here.

Will he be produced, please.

Mr. Phillips: Your Honor, before we proceed, I see that Mr. Ricord's niece and daughter have entered the courtroom. The trial is under way. So I would ask that the ruling your Honor has already made be invoked and that they be excluded.

The Court: Yes. I sequestered the witnesses, and that is a court order. So each side will have to watch their own witnesses and make sure that they comply with the rules.

Mr. Handman: Let it be noted they just walked in now.

The Court: Nobody is faulting them at this point. I am just saying, make sure that your witnesses are not here during any portion of the trial, except when they are called.

Mr. Handman: Inasmuch as the first thing to be done now is the continuation of the pretrial hearing, is it all right if they remain? They have nothing to do with the testimony of Bianchi.

The Court: I don't see any harm in them being here at this point. All right.

Appendix "D"

Stenographer's Minutes, Dated December 5, 1972

Where is Bianchi?

The Court: I note the presence of his attorney. I appreciate his coming over here at this point.

As I understand it, Mr. Diller, you have advised with your client and it is his present position that he is going to exercise his Fifth Amendment rights?

Mr. Diller: That is correct, your Honor.

The Court: All right. Now we'll hear it from him, if that is the fact.

Do you speak English, Mr. Bianchi?

Mr. Bianchi: No.

Mr. Phillips: There is a Spanish interpreter here. Secondly, Mr. Diller would like to have an opportunity to talk to him.

Mr. Diller: For thirty seconds.

The Court: Go over to the interpreter and satisfy yourself that the interpreter understands.

Mr. Handman: Can I take this opportunity to approach the bench on a collateral matter with Mr. Phillips? I don't think the stenographer is necessary here.

(Discussion off the record)

Appendix "D"
Stenographer's Minutes, Dated December 5, 1972

CESAR BIANCHI, called as a witness, being first duly sworn, testified through the interpreter as follows:

Examination by the Court:

Q. You are a defendant in this case? A. I don't know how to answer this question.

Q. Well, you have been charged with a crime, have you not? A. Yes.

Q. And you have a lawyer? A. Yes.

Q. And you have spoken to your lawyer, A. Yes, sir.

Q. Your case is still open, A. I think so.

Q. The lawyer for the defendant Ricord wants to question you. Are you prepared to answer any questions, or are you going to exercise your constitutional privilege to refuse to answer any questions which will incriminate you?

Mr. Handman: Objection. I would think that that would become evident when I ask the question, and I don't think the witness should be instructed as to what he shouldn't do before the questions are put to him.

The Court: Overruled.

A. I take my constitutional right not to answer to any question that might incriminate me.

The Court: All right. That terminates this witness as far as I am concerned.

Mr. Handman: Do I take it then your Honor will not let me put even a single question to this witness?

Appendix "D"
Stenographer's Minutes, Dated December 5, 1972

The Court: Not a single solitary question. Not even his name. He has indicated to me that he wants to exercise his constitutitonal privilege, and even the giving of his name, or where he is presently staying at, may in some way incriminate him, and he does not desire to give up that right, and I sustain it, and he is excused.

The hearing is closed again, and I will hear your motion, the motion to suppress. I have already indicated prior that I denied the motion, and if there is anything you want to say about that I will hear you, but I don't expect any extended argument at this time.

(Witness excused)

Mr. Handman: Am I correct in that your Honor is not permitting me to call Mr. Boulad to testify on the motion, also? I want to call Mr. Boulad.

The Court: You never made that request of me.

Mr. Handman: Yes, I am sorry, your Honor, I did this morning.

The Court: What's the offer of proof on Boulad?

Mr. Handman: Knowledge concerning the seizure, information leading up to the seizure, knowledge concerning the alleged ownership of the drugs in question.

The Court: I find the ownership to be immaterial, and the other evidence to be cumulative. I deny the request, with an exception to the defendant.

Both sides having been heard, I reiterate the ruling of the Court. The motion to suppress is denied. A memoran-

dum will be filed setting forth findings of facts and conclusions of law.

Mr. Handman: I would just like to state the motion for the record without argument at this time, if your Honor would permit me to do so as far as the suppression.

The Court: Your motion is on file and I have it on paper and it's part of the record of this case.

Mr. Handman: I would simply like to make clear that it's motion to suppress the alleged contraband seized on the 19th of October, 1970, to suppress the alleged contraband seized on the 20th of October, 1970, to suppress any alleged contraband seized directly from Mr. Bianchi in his release or case, and I also move to preclude the government from offering any testimony with regard to the evidence seized on the 20th and from Mr. Bianchi as not being covered within the scope of their disclosure and particulars.

The Court: All the motions are denied. I have previously denied the motions, and I deny them again.

(Bring in the jury)

APPENDIX "E"

Motion to Suppress—November 15, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Index No. 72 Cr. 1105

UNITED STATES OF AMERICA

—v.—

AUGUSTE JOSEPH RICORD,
a/k/a ANDRE RICORD, et al.,

Defendants.

MOTION AND MEMORANDUM OF LAW

This and Motion and Memorandum are being submitted as a new Motion for the Suppression of all the heroin referred to in the indictment heren as supplemented by subsequent proceedings including the Bill of Particulars and disclosure. The Government has taken the position unequivocally that such heroin was the property of defendant Ricord.

The discussion of suppression of evidence which took place previously was at a time prior to the Government's Bill of Particulars in which the Government stated its position as to the heroin referred to in this proceeding and affirmed that such heroin was the property of Ricord.

During the previous limited discussion of the matter of suppression, the Court indicated that under *Wong Sun*, defendant Ricord lacked standing to make such a motion.

Appendix "E"
Motion to Suppress—November 15, 1972

Counsel for the defendant Ricord has made a careful study of the question of standing and particularly the *Wong Sun* case, *Wong Sun* v. *United States,* 371 U.S. 471 9 L.Ed. 2d 441, 83 S. Ct. 407 (1963).

Fortunately for all concerned, the state of the law as to "standing", where there are multiple defendants and conspirators need not be gone into at this point, as the Government's statement that the heroin was Ricord's property has clearly resolved the question of standing so that any standing impediment is no longer present in this case.

In fact, if the seizure of the heroin was illegal as defendant Ricord asserts, then under the *Wong Sun* case any evidence secured as a result of such illegal seizure is "tainted" and cnnot be used in these proceedings.

Under the celebrated doctrine of *Jones* v. *United States,* 362 U.S. 257, 4 L.Ed. 2d 967, 80 S.Ct. 725 (1960), defendant Ricord has the right to contest the legality of the seizure without asserting any ownership of the heroin. It is sufficient that the Government may use such heroin against him at the trial.

While it may seem rather anomalous to the layman, the law seems clear that a defendant, such as Ricord, may contest the legality of a seizure of property the ownership of which he denies, from a person other than himself and at a place other than his house or home.

The Rule under which this Motion to Suppress is made is clear and definite as to who may make it, to wit:

Appendix "E"
Motion to Suppress—November 15, 1972

',Federal Rules of Criminal Procedure Rule 41
Search and Seizure

(e) Motion for Return of Property and To Suppress Evidence.

> **A person aggrieved by an unlawful search and seizure may move . . . to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without a warrant, etc. . . ."**

It would be hard to imagine a case where the words "a person aggrieved" could be more apt.

Furthermore, the Constitution of the United States, Fourth Amendment, bears constant repetition:

> **"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, etc."**

For the purpose of this motion defendant Ricord must be considered as asserting is own personal rights.
***United States* v. *Jeffers,* 342 U.S. 48 (1950)**

Under the foregoing circumstances a full evidentiary hearing is required to determine the circumstances under which the Government secured possession of such heroin and whether such seizure was violative of the rights of defendant Ricord under the laws and Constitution of the United States.

What was said by Mr. Justice Frankfurter in *Jones* v. *United States, supra,* pp. 262-264, is much in point here:

Appendix "E"
Motion to Suppress—November 15, 1972

"The Government urges us to follow the body of Court of Appeals decisions and to rule that the lower courts, including the courts below, have been right in barring a defendant in a case like this from challenging a search because of his failure, when making the motion to suppress, the allege either that he owned or possessed the property seized or that he had a possessory interest in the premises searched greater than the interest of an 'invitee or guest.'

* * * * *

"The prosecution here thus usbjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice tc sanction such squarely contradictory assertions of power by the government."

There is an excellent discussion of various cases on standing in People v. Smith (Sobel, J.) 230 N.Y.S. (2) 894, Part II.

We submit that as Justice Sobel points out in his brochure, "Current Problems n the Law of Search and Seizure" published in 1964 on p. 135:

"It need only be mentioned that the rule of 'standing' is occasionally confused with the 'primary taint' rule.

* * * * *

"But a *'primary taint'* issue arises whe na defendant objects to the admission of evidence from *him* on the ground that the unreasonable search and seizure from another furnished the probable cause for his arrest and search.

Appendix "E"
Motion to Suppress—November 15, 1972

> "This of course is not a 'standing issue'. A defendant may complain of *another's* unreasonable search under the "primary taint' doctrine to establish that *his* search was unreasonable. (Wong Sun 1. United States, 371 U.S. 471)."

We submit that, in any case, and particularly the instnt cse, even though the Government must prove other matters, the *Jones* case definitely gives defendant Ricord standing.

In *United States* v. *Wood* [CCA 2d] 270 F. Supp. 963, 966 n. 3 (1967) the Court said:

> "With due respect, we do not think that the principle established by the Jones case is to be read so narrowly. It is 'still squarely contradictory' for the government to charge out of one side of its mouth that the defendant had possession, even though in addition to possession the government must ultimately prove other matters, and to say out of the other that the defendant, as movant, lacked standing, because he did not have possession. Niro v. United States (C.A. 1st) 1968, 388 F.2d 535, 537."

See also:

> *United States ex rel. Coffey* v. *Fay,* (CA 2d (1965) 344 F.2d 625.

An evidentiary hearing is required wherever there are issues of fact necessary to a decision of a motion to suppress as exists in the instant case.

> *Hoffritz* v. *United States,* (CA 2d) (1956) 240 F.2d 109.
>
> *United States* v. *Martin,* (D.C.N.Y. 1959) 176 F. Supp. 409.

Appendix "E"
Motion to Suppress—November 15, 1972

The case of *Alderman* v. *United States* (1969) 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed. 2d 176, makes it clear that whatever limits the "standing" rule may impose on the movant in a motion to suppress, anyone whose Fourth Amendment rights have been violated has such standing.

We, therefore, respectfully submit that a hearing date be set and defendant Ricord be given the right to subpoena any and all relevant witnesses and evidence to determine the issue of the legality of the seizure of the heroin alleged to be his property.

Dated: New York, New York
November 15, 1972

Respectfully submitted,

HERBERT I. HANDMAN,
Attorney for Defendant Ricord
Office and P.O. Address
36 West 44th Street
New York, New York 10036
Tel. (212) YUkon 6-5460

TO: HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney, S.D.N.Y.

APPENDIX "F"

Affidavit Opposing Motion to Suppress

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Cr. 1105

UNITED STATES OF AMERICA

—v.—

AUGUSTE JOSEPH RICORD,
a/k/a Andre Ricord.
a/k/a Monsieur Andre, et al..

Defendants.

State of New York
County of New York
Southern District of New York ss:

WALTER M. PHILLIPS, JR., being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and am in charge of the above captioned case. This affidavit is submitted in opposition to defendant Ricord's motion for suppression of all heroin referred to in the indictment.

2. The heroin which Ricord moves to suppress and which the Government intends to offer as evidence, is 95 pounds taken from co-defendant Cesar Bianchi's private airplane in Florida. This plan was observed by agents of the Bureau

Appendix "E"
Motion to Suppress—November 15, 1972

of Customs as it arrived in this country on October 18, 1970 at Miami, Florida. From the time of its arrival until the heroin was seized the plane was under constant surveillance by Customs agents.

3. It is the Government's position that any hearing on the question of the legality of this seizure should await the trial of this case and the Government's offer of this evidence.

4. First, Ricord's motion raises no factual issue which must be determined prior to trial, since it is wholly unsupported by any affidavit. Absent any factual assertion that an illegal seizure was made, a pre-trial hearing is unwarranted.

5. Secondly, a pre-trial hearing on the question of the legality of the seizure would necessitate bringing witnesses (Customs agents) here from Miami, when these same witnesses will in any event be present to testify at trial. It would therefore be more expedient to consider the question at that time, especially since the Government's factual showing on the issue of the legality of the seizure will be no different from the trial testimony it will offer through these witnesses.

6. Finally, there may be a question as to Ricord's standing to question the legality of the seizure, irrespective of the assertion in the Government's Bill of Particulars that the heroin was in fact Ricord's. Thus if it appears that Ricord does not have a sufficient proprietary interest to contest the seizure, a hearing on its legality would be unnecessary.

WHEREFORE, your deponent prays that defendant Ricord's motion for a pre-trial hearing to suppress evidence be denied.

WALTER M. PHILLIPS, JR.,
Assistant United States Attorney

Sworn to before me this
20 day of November, 1972.
WALTER G. BRANNON.

APPENDIX "G"

Decision on Motion to Suppress, February 29, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Index No. 72 Cr. 1105

UNITED STATES OF AMERICA,

—against—

AUGUSTE JOSEPH RICORD,
a/k/a ANDRE RICORD,
a/k/a MONSIEUR ANDRE,

Defendant.

CANNELLA, *J.*

Defendant's motion to suppress, made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, is denied.

The court finds that on or about September 18, 1970, an anonymous communication was received by the F.B.I. and subsequently forwarded to the U.S. Bureau of Customs.[1] Various customs agents then proceeded to investigate the facts contained in that communication. The F.A.A. was queried about certain planes mentioned in the communication. One plane, a foreign registered Cessna 210 LVHDW was recorded as landing at Miami International Airport in early October, 1970. The Customs agents assisted by agents of the Bureau of Narcotics and Dangerous Drugs made further investigations at the Miami airport.

[1] See Petitioner's Exhibit 1.

Appendix "G"
Decision on Motion to Suppress, February 29, 1973

On October 18, 1970, the Cessna 210 aircraft in question was report as leaving Kingston, Jamaica with its destination Miami International Airport. The plane was observed to land and the pilot and co-pilot, Cesar Bianchi and Renato Balestra, posittioned the plane in front of the General Aviation Center Building (GAC) and then reported to the Customs checkpoint in the GAC building. They carried with them two suitcases. Subsequently, they returned to the plane and taxied to a parking area about 100 yards away. They left the airport in a car and, after making various stops in Miami, they were last seen by Agent Hopkins proceeding in a southerly direction.

On October 19, 1970 the Cessna 210 flown by Bianchi and Balestra, left Miami International Airport and proceeded to North Perry Airport, about 30 miles away in Miramar, Florida. Instead of proceeding directly to North Perry the plane took an evasive route westerly over the Everglades, then returned eastward and finally went north. After the plane landed at North Perry, Bianchi and Balestra entered a car and proceeded once again to use evasive tactics.

The court finds that at the time in question, Customs did not as a practice search small planes. Such planes were only searched if they declared cargo or if a particular agent was interested in a particular plane.

While the plane was parked at Miami International on October 18, a quarantine inspector from the Department of Agriculture approached the plane, opened the door and looked in. He made no search or seizure. On October 19, at approximately 7:00 p.m. when the plane was at North Perry, it was searched by Customs Agent Hopkins. He

examined the back seat and removed an auxiliary gas tank and an access panel. Agent Hopkins removed a suitcase from the compartment and slit the bottom portion of the suitcase with a knife and pulled out a plastic bag containing a white powdery substance. This substance was tested with a Marquis Reagent and reacted positive, indicating the presence of an opium derivative. Eventually, on the next day, three suitcases were removed by the agents from the rear compartment of the plane.

The defendant seeks to suppress this material urging that no search or arrest warrant issued to the agents at any time during the incident.

At the outset, the court finds that the defendant lacks standing to challenge the validity of the search. "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given'. Hatch v. Reardon, 204 U.S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property". Jones v. United States, 362 U.S. 257, 261 (1960). See also Wong Sun v. United States, 371 U.S. 471 (1963). In this case, there was clearly no search or seizure from the defendant himself; the property in question was at most

in the construction possession of Bianchi and Balestra and the right to object redounds to them.[2]

In any event, the court finds the search to be legal and valid in all respects. It was conducted with probable cause and was not unreasonable. From the totatlity of the knowledge possessed by the Customs agents and others, there was sufficient probable cause to conduct the search. It was reasonable for them to assume that the aircraft was smuggling narcotics into the United States. The court is not pursuaded that a search warrant should have been obtained even though there is evidence that the plane was parked and its wheels chocked with lines attached.[3] We are not concerned here with the search of a house or eevn a motor vehicle, but with a speedy, not readily pursuable light aircraft that could with ease take off and disappear possibly to Cuba or some other Caribbean island.

Furthermore, the court concludes that the agents conducted a vaild border search. While border searches are restricted by the requirement that they be reasonable, mere suspicion that a person is carrying merchandise unlawfully imported into the United States is sufficient. 19 U.S.C. § 482. Border searches are in a category distinct from other searches and seizures, and neither a search warrant nor probable cause is required. Walker v. United States,

---

[2] The Government has evidently alleged that the defendant was in fact the owner of the property seized. Defendant urges that this propriety interest in the property seized is sufficient to confer standing. The court is not persuaded that this factor by itself necessarily confers standing. Nonetheless, the court proceeded to conduct a full evidentiary hearing.

[3] Although the aircraft was secured in this fashion, it could easily have been freed in a matter of seconds. See Hearing Minutes, p. 60.

Appendix "G"
Decision on Motion to Suppress, February 29, 1973

404 F.2d 900, 902 (5th Cir. 1968); Rodriguez-Gonzalez v. United States, 378 F.2d 256, 258 (9th Cir. 1967). See also, United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969). Under all the circumstances of this case, including the constant surveillance of the aircraft by the agents, there was certainly reasonable cause to suspect that merchandise was being imported contrary to law.

In view of the foregoing, defendant's motion to suppress is denied.[4]

So ordered.

Dated: New York, N.Y.
January 29, 1973

s/JOHN M. CANNELLA
U.S.D.J.

[4] At the conclusion of the hearing, the court denied the defendant's motion and indicated that it would file a memorandum setting forth its findings of fact and conclusions of law. Thereafter, the defendant's motion was renewed during the course of the trial and denied. After hearing all the evidence disclosed at the hearing and trial, the court is convinced that the search was legal in all respects.

APPENDIX "H"

Notice of Hearing on Petition for Writ of Mandamus

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

72 Cr. 1105

In Matter of the Petition of

AUGUSTE JOSEPH RICORD

For a Writ of Mandamus Directed to The Honorable John M. Cannella, United States District Judge, Southern District of New York.

SIRS:

PLEASE TAKE NOTICE that the annexed petition of Auguste Joseph Ricord, verified by the undersigned, Herbert I. Handman, as attorney, on November 29, 1972, for a Writ of Mandamus will come on to be heard at a Term of this Court to be held at the United States Courthouse, Foley Square, New York, New York, on the 4th day of December 1972, at 10:30 A.M., in the forenoon of that day, or as soon thereafter as counsel can be heard, at which time Petitioner will seek the relief requested in said Petition, and such other and further relief as to the Court may seem just and proper.

Appendix "H"
Notice of Hearing on Petition for Writ of Mandamus

Dated: November 29, 1972.

Yours, etc.,

HERBERT I. HANDMAN
Attorney for Defendant
Auguste Joseph Ricord
36 West 44th Street
New York, New York 10036
Tel. YUkon 6-5460 (212)

To:

HON. JOHN M. CANNELLA
United States District Judge
For the Southern District of New York
United States Courthouse
Foley Square, New York, New York

HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney
For the Southern District of New York
United States Courthouse
Foley Square, New York, New York

Petition for a Writ of Mandamus

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

72 Cr. 1105

In Matter of the Petition of

AUGUSTE JOSEPH RICORD

For a Writ of Mandamus Directed to The Honorable John M. Cannella, United States District Judge, Southern District of New York.

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Petitioner, Auguste Joseph Ricord, respectfuly petitions the Honorable Judges of the United States Court of Appeals for the Second Circuit to issue a Writ of Mandamus directing the Honorable John M. Cannella, United States District Judge, Southern District of New York,

1. To vacate his orders and decisions insofar as they denied Petitioner's Motions for

   A. An evidentiary hearing as to the isues of fact and circumstances whereby Petitioner's body was brought into the jurisdiction of the United States and before the said Court.

   B. An evidentiary hearing as to the issues of fact and circumstances concerning the seizure of various alleged narcotics alleged by the United States to be the property of Petitioner.

C. Granting an adjournment of the Trial of the Petitioner for a reasonable period of time to enable attorney for the Petitioner to properly prepare the defense and be in a position to render effective assistance of counsel.

D. Hon. John M. Cannella to disqualify himself to proceed in the prosecution of the criminal proceedings any further.

2. To Grant such Motions on reasonable conditions, as to A-C in No. 1, above and as to D, if granted, cease to participate in the case.

1. Petitioner is named as a Defendant in indictment, Index No. 72 Cr. 1105, which was returned October 2, 1972 and contains one Count of Conspiracy to Violate the old "Harrison Act", Title 21, Secs. 173 and 174, which law has now been superseded by the new Drug Control Act which became effective May 1, 1971. This indictment superseded two previous Indictments, one of which was the one used as the basis for the alleged extradition of the Petitioner. The Trial of the new Indictment is scheduled to begin December 4, 1972 and between the date of this Petition and the Trial Date Depositions are being taken in Paraguay of prospective defense witnesses.

2. The Petitioner asserts that the extradition of his person to the United States and the prosecution of this case have received world wide attention already and will continue to receive an incredible amount of publicity.

The principal reason for news interest in this case is that the physical presence of the Petitioner here within the United States and within this District was secured by flagrant disregard for all the rules and precedents of International Law, comity between sovereign nations, the Treaties with respect to Extradition involved and ordinary decency and civilized conduct.

3. Petitioner moved to dismiss the proceedings due to lack of jurisdiction over his person and requested the opportunity to present the facts so as to have before the District Court and the appellate courts in the event of appeals, the factual background of the means and methods by which Petitioner's presence in this jurisdiction was secured. This opportunity was summarily denied by Judge Cannella.

4. The United States has established certain principles and rules of law for the purpose of deterring illegal and unconscionable activities on the part of its prosecutorial agencies. The "exclusionary rule" is but one example. There are others and there is above all the supervisory power of the Court of Appeals and the Supreme Court to see that justice is administered in accordance with the principles of American due process. It is difficult to believe that the United States Courts will condone, or approve the acquisition of jurisdiction of the person physically by kidnapping or "shanghaing" in order to prosecute him criminally. However unfortunate it may be for Petitioner to be a sort of test case of such procedure and its legality, let alone morality", at least the right to present all the relevant facts and circumstances relating to the so called "extradition" to the court should not be denied to him. The Petitioner asserted in the District Court his right to and the necessity of an evidentiary hearing with respect to the facts. This was denied. In the ordinary case, such hearings are many times denied on the basis that such a hearing would be nothing but a "fishing expedition". Here in this case, the situation is entirely different. The United States gave out innumerable press releases and other publicity informing the world of the various pressures it had used to secure the cooperation and assistance of the Paraguayan Government, including its judiciary, and certainly with "tongue in cheek", there was a press release that the United States Embassy in Paraguay had even gone so far as

to cancel an Annual Picnic and Party which had become an important event. The United States claims that it extradited the Petitioner from Paraguay; the Petitioner denies that the means and methods used were "extradition" in the true sense of the word. The Petitioner asserts that a hearing on such question should be held in advance of any trial on the facts.

5. The indictment and prosecution in this case assert that Petitioner conspired to bring narcotic substances into the United States and set forth certain quantities which the Government had seized and had in its possession. The government further asserted in its Bill of Particulars that such alleged narcotics were the property of the Petitioner. Petitioner asked for an evidentiary hearing to determine the facts with respect to the alleged seizure and whether such seizure was legal under the laws of the United States and its Constitution. Such a hearing was denied; first on the ground that Petitioner did not have standing and second on the ground that because the alleged narcotics were taken from a co-defendant, the legality of the seizure was not relevant or material to the Petitioner's defense. Reference is made to the Motions on this point and the Minutes which are part of the Appendix to this Petition for the details with respect to this matter and which show that Judge Cannella completely misinterpreted the law with respect to standing to move to suppress and the Petitioner's rights where property alleged to be his is involved. Petitioner asked for a Pre-Trial Evidentiary Hearing. Judge Cannella has said that such a hearing may be held during the Trial. This procedure is not only improper but will be highly prejudicial to the orderly trial of this case and to the rights of the Petitioner to due process and a fair trial. The Pre Trial Hearing should be ordered and held in advance of the Trial in Chief.

Petition for a Writ of Mandamus

On November 28, 1972 at the time of the entrance of the Order of Judge Cannella with respect to the taking of Depositions in Paraguay, Petitioner presented a Motion on papers for a reasonable adjournment of the Trial of this case. Such Motion was denied. Reference is made to such papers which are part of the Appendix to this Petition so as to show that by the denial of such adjournment, Judge Cannella has denied Petitioner any possibility of effective assistance of counsel.

7. Petitioner reluctantly now feels that it is necessary in the interest of justice to refer to a matter which is personal to Judge Cannella but in the opinion of Petitioner has had and will continue to have an effect on the proceedings in this case. Judge Cannella has advised that one of the reasons for refusing to grant any delays and for setting the trial down peremptorily for December 4, 1972 is that on December 22, 1972, his Honor is scheduled to enter the hospital for a serious operation affecting his eyes. The Government has indicated that it will call a good amount of witnesses and their direct and cross will certainly consume several days of court work. In addition the defense is planning to call many witnesses and their direct and cross will also consume mny days of court work. With Hon. Judge Cannella's personal time table in the back of his Honor's mind, especially in view of the seriousness of the operation involved, it is too much to expect of any one, even an experienced Trial Judge such as Judge Cannella, that the trial proceedings can be conducted in the atmosphere and under the impartial and careful supervision which Petitioner's trial merits.

8. In addition to requesting a Writ of Mandamus directing Judge Cannella to grant the relief above discussed, Petitioner respectfully asks this Court to review the decision of Judge Cannella, in which he declined to

recuse himself, particularly in the light of his Honor's subsequent actions recounted and referred to above and appearing in the Appendix submitted with this Petition. There has been a continuous record of passing upon motions without regard to the papers submitted and without regard to Memoranda as to the law applicable to the situation. It is also clear from the minutes of the various proceedings before Judge Cannella that his Honor has prejudged the matter of extradition and also other matters by virtue of information secured from other proceedings which have been before his Honor but which are not part of the record in this proceeding. It would appear that there have been innumerable conferences at which Judge Cannella was present at which factual matters involved in the present proceedings were involved and discussed but at which Petitioner was not present or represented. It is also obvious from the record in this case that Judge Cannella is disposed to try this case at all costs. It is also obvious from various other narcotic proceedings in which Judge Cannella has been involved that his Honor feels so strongly about the narcotic problem that on more than one occasion these feelings have been expressed to juries who were to deliberate on the guilt or innocence of defendants, when in fact these feelings of Judge Cannella, however correct or justified, are of questionable relevance or propriety in any particular case. The reluctance of any Judge to recuse himself is too well known to dwell upon and the greater reluctance of this Court to interfere is also well known. The Court is respectfully requested to consider the whole matter in the light of the world-wide interest in this case and all the special circumstances involved.

9. Because of the importance of this Petition and for the convenience of the Court, Petitioner has attached hereto a Schedule of certain of the important proceedings before

Judge Cannella. While they are voluminous, Petitioner knew of no other way to get the matter before this Court and to look at them now is much easier than later in a full record on appeal from a long and complicated trial.

WHEREFORE, the Honorable Judges of the United States Court of Appeals for the Second Circuit are respectfully requested to grant the relief requested in this Petition and issue a Writ of Mandamus directed to Hon. Judge Cannella; or, in the alternative, should the requested relief be denied by this Court, Petitioner respectfully requests that all proceedings below be stayed for sufficient time to permit him to prepare and file an appropriate petition with the United States Supreme Court.
Dated: November 29, 1972

AUGUSTE JOSEPH RICORD,
Petitioner.

By HERBERT I. HANDMAN
Attorney

State of New York)
County of New York) ss.:

Herbert I. Handman, being duly sworn, says that he is the attorney for the petitioner above named, that he had read the foregoing petition, and it is true of his own knowledge, except as to matters stated on information and belief, and that as to those matters he believes it to be true; this verification is made by affiant because the Petitioner does not read or write English.

HERBERT I. HANDMAN

Sworn to before me this 29th
day of November, 1972.

APPENDIX "I"

Application for Adjournment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Index No. 72 Cr. 1105

UNITED STATES OF AMERICA,

—v.—

AUGUSTE JOSEPH RICORD,
a/k/a ANDRE RICORD, *et al.*,

Defendants.

State of New York
County of New York ss.:

HERBERT I. HANDMAN, being duly sworn deposes and says:

That he is an attorney duly admitted to practice in this Court and is the attorney for the defendant Auguste Ricord herein.

That he is a single practitioner with his office at the Bar Building, City and State of New York for over ten years.

That all of the following factors, among others, have made the preparation of the defense of this case both exceedingly difficult and most unusual:

Appendix "I"
Application for Adjournment

1. Defendant speaks no English.

2. Defendant is in maximum segregation in prison.

3. Defendant has no family or friends in this country.

4. Defendant is not in good health and was hospitalized by the Government for several days.

5. All overt acts alleged and ascribed to this defendant occurred about 10,000 miles from this jurisdiction and place of trial.

6. Many of the overt acts alleged to other conspirators occurred both in foreign jurisdictions and on other States.

7. Almost all of the potential witnesses speak no English and their languages are French, Spanish or Portuguese.

8. There are extremely novel questions of law presented.

9. All possible defense witnesses reside in at least two foreign countries.

That this indictment was returned on *October 2, 1972, less than two months ago,* and there are numerous prior indictments and cases yet to be heard or tried in this Court, the average case, on information and belief, taking over five months before trial.

That defendant is and most likely will continue to be incarcerated pending the trial and so the Government cannot be prejudiced in this respect.

Appendix "I"
Application for Adjournment

That defendant's attorney has so far been forced by direction of the Court to proceed in so hasty a manner as to be unable to attend to other trial and appellate matters long pending in this and other Courts, all of many months longer duration than this instant case. nI fact such a course has necessarily forced a sharp curtailment in handling other legal matters and should this Court follow such a practice regularly it would probably froce the majority of criminal lawyers in this jurisdiction out of business since they are single practitioners.

That the efforts of deponent to date in this case are set forth in Part II of the schedule annexed hereto, which however does not reflect Court dates, conferences and visits with the defendant at the Federal Detention Center, all of which have been voluminous.

That in the records of this case are sworn statements of assistant United States Attorneys and other Government agents to the effect that with respect to potential witnesses in this case the assistant "discussed [witnesses] position with him, with his wife, with his sister, and with his two attorneys . . . on numerous occasions . . . explained and re-explained in great detail." The Government has had the opportunity to assemble and develop its case through scores of meetings over a period of two years.

That deponent's few days in Paraguay were only enough to scratch the surface of witnesses already known to the defendant and over eleven people had to be found and interviewed for the very first and last time in a foreign country with a very short work day in less than three days. Had deponent stayed longer, the other matters to be done indicated in the schedule annexed, part II, would not have been possible.

Appendix "I"
Application for Adjournment

That there must still be done prior to the trial herein, the following at last: investigation of the Government's possible witnesses, investigation of airplane flights alleged, scientific examination of the alleged narcotics, securing of certain physical evidence in Paraguay, obtaining depositions from known and unknown witnesses, issuance of subpoenas and preparation of trial memorandums of law.

That deponent conservatively estimates that the total *man hours actually spent* on preparation of this case by the Government bears at least a ten to one ratio to the *total number of business hours available* to the defense since the current indictments, assuming defense counsel worked exclusively on this case.

That the current date set for the trial of this case does not permit the scales of justice to be fairly balanced by each side. Deponent requires at the very least some months from the date the currently pending depositions are completed, translated and transcribed for proper preparation of this case. It would be more than a simple failure of justice to force this defendant to defend at trial after all that the various Government agencies, U.S. customs, BNDD, State Department, CIA, etc., have done over two full years, without time to plan, complete and evaluate the basic legal procedures to which he is entitled by statute.

WHEREFORE, it is respectfully requested that this case be adjourned for all purposes for at least three months from the date of the completion of the scheduled depositions.

.....
HERBERT I. HANDMAN

Sworn to before me this day of November, 1972.

Appendix "I"
Application for Adjournment

UNITED STATES OF AMERICA

vs.

AUGUSTE RICORD

SCHEDULE OF PROCEEDINGS HAD

I. UNITED STATES ATTORNEY'S OFFICE

A. Investigation of this case was initiated prior to September of 1970.

B. Involved in the investigation and development of the case were,

1. U.S. Attorney's office—New York
2. U.S. Attorney's office—Washington
3. B.N.D.D.
4. U.S. Customs
5. U.S. Foreign Service
6. CIA

C. After the defendant's extradition he first secured counsel in the United States on September 11, 1972; after which the United States Attorney's office did the following:

1. Moved to join the case for trial with another indictment on September 15, 1972.

Appendix "I"
Application for Adjournment

2. Procured a new superseding indictment on October 3, 1972 (the indictment herein).

3. Furnished a purported Bill of Particulars dated October 17, 1972.

4. Thereafter furnished a purported amended Bill of Particulars dated October 27, 1972, adding significant allegations.

5. Amended the latter Bill on October 31, 1972 and again on November 6, 1972.

II. THE DEFENDANT'S ATTORNEY

A. Met defendant for the first time on *September 11, 1972.*

B. Had to make copies of available Court proceedings and translate portions of them which were in French and Spanish. (*To this date the Court file does not contain many of the prior proceedings,* and despite several requests in open Court, deponent has not yet received these documents.)

C. Made a motion to recuse dated September 13, 1972.

D. Secured an order for a medical examination of defendant dated September 20, 1972.

E. Made motions toward the initial indictment dated September 27, 1972.

F. Attended at medical examinations of defendant twice.

G. Submitted an order requesting dismissal of the original indictment.

Appendix "I"
Application for Adjournment

H. Submitted a memorandum regarding jurisdiction dated October 17, 1972.

I. Made Preliminary Motions (thirty pages) under sixteen categories on October 13, 1972.

J. Submitted a thirty-four page memorandum regarding the Particulars and Discovery.

K. Submitted an additional memorandum on discovery dated October 30, 1972.

L. Made a motion for suppression of evidence dated November 15, 1972.

M. Met with the AUSA to discuss the Particulars and receive certain evidence.

N. Travelled to Paraguay to investigate the charges from November 18, 1972 until November 23, 1972.

O. Made a motion to take depositions of witnesses on November 27, 1972.

APPENDIX "J"

Treaty between the United States and Paraguay for the mutual extradition of fugitives from justice. Signed at Asuncion, March 26, 1913; ratification advised by the Senate, June 5, 1913; ratified by the President, October 16, 1913; ratified by Paraguay, July 16, 1913; ratifications exchanged at Asuncion, January 17, 1914; proclaimed, January 24, 1914.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.
A PROCLAMATION.

Whereas a Treaty between the United States of America and the Republic of Paraguay for the mutual extradition of fugitives from justice was concluded and signed by their respective Plenipotentiaries at the City of Asuncion, on the twenty-sixth day of March, one thousand nine hundred and thirteen, the original of which Treaty, being in the English and Spanish languages is word for word as follows:

Extradition Treaty between the United States of America and the Republic of Paraguay.

The United States of America and the Republic of Paraguay, desiring to strengthen their friendly relations and to promote the cause of justice, have resolved to conclude a treaty for the extradition of fugitives from justice, between the United States of America and the Republic of Paraguay, and have appointed for that purpose the following Plenipotentiaries:

The President of the United States of America, Nicolay A. Grevstad, Envoy Extraordinary and Minister Plenipotentiary of the United States of America to the Republic of Paraguay; and

Appendix "J"
Extradition Treaty—Paraguay

The President of Paraguay, Doctor Eusebio Ayala, Minister for Foreign Affairs of The Republic of Paraguay;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:

ARTICLE I.

It is agreed that the Government of the United States and the Government of Paraguay shall, upon mutual requisition duly made as herein provided, deliver up to justice any person who may be charged with, or may have been convicted of any of the crimes specified in Article II of this Convention committed within the jurisdiction of one of the Contracting Parties while said person was actually within such jurisdiction when the crime was committed, and who shall seek an asylum or shall be found within the territories of the other, provided that such surrender shall take place only upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed.

ARTICLE II

Persons shall be delivered up according to the provisions of this Convention, *who shall have been charged with or convicted of any of the following crimes*:

1. Murder, comprehending the crimes designated by the terms parricide, assassination, manslaughter, when voluntary; poisoning or infanticide.

2. The attempt to commit murder.

Appendix "J"
Extradition Treaty—Paraguay

3. Rape, abortion, carnal knowledge of children under the age of twelve years.

4. Bigamy.

5. Arson.

6. Wilful and unlawful destruction or obstruction of railroads, which endangers human life.

7. Crimes committed at sea:

a) Piracy, as commonly known and defined by the law of nations, or by statute;

b) Wrongfully sinking or destroying a vessel at sea or attempting to do so;

c) Mutiny or conspiracy by two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the Captain or Commander of such vessel, or by fraud or violence taking possession of such vessel;

d) Assault on board ship upon the high seas with intent to do bodily harm.

8. Burglary, defined to be the act of breaking into and entering the house of another in the night time with intent to commit a felony therein.

9. The act of breaking into and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance companies, or other buildings not dwellings with intent to commit a felony therein.

Appendix "J"
Extradition Treaty—Paraguay

10. Robbery, defined to be the act of feloniously and forcibly taking from the person of another goods or money by violence or by putting him in fear.

11. Forgery or the utterance of forged papers.

12. The forgery or falsification of the official acts of the Government or public authority, including Courts of Justice, or the uttering or fraudulent use of any of the same.

13. The fabrication of counterfeit money, whether coin of paper, counterfeit titles or coupons of public debt, created by National, State, Provincial, Territorial, Local or Municipal Governments, bank notes or other instruments of public credit, counterfeit seals, stamps dies and marks of State or public administrations, and the utterance, circulation or fraudulent use of the above mentioned objects.

14. Embezzlement or criminal malversation committed within the jurisdiction of one or the other party by public officers or depositaries, where the amount embezzled exceeds two hundred dollars or Paraguayan equivalent.

15. Embezzlement by any person or persons hired, salaried or employed, to the detriment of their employers or principals, when the crime or offence is punishable by imprisonment or other corporal punishment by the laws of both countries, and where the amount embezzled exceeds two hundred dollars or Paraguayan equivalent.

16. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons, in order to exact money from them or their families, or for any other unlawful end.

Appendix "J"
Extradition Treaty—Paraguay

17. Larceny, defined to be the theft of effects, personal property, or money, of the value of twenty-five dollars or more, or Paraguayan equivalent.

18. Obtaining money, valuable securities or other property by false pretences or receiving securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of the property so obtained or received exceeds two hundred dollars or Paraguayan equivalent.

19. Perjury or subornation of perjury.

20. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administrator, guardian, director or officer of any Company or Corporation, or by any one in any fiduciary position, where the amount of money or the value of the property misappropriated exceeds two hundred dollars or Paraguayan equivalent.

21. Crimes and offences against the laws of both countries for the suppression of slavery and slave trading.

22. The extradition is also to take place for participation in any of the aforesaid crimes as an accessory before or after the fact, provided such participation be punishable by imprisonment by the laws of both Contracting Parties.

ARTICLE III.

The provisions of this Convention shall not import claim of extradition for any crime or offence of a political character, nor for acts connected with such crimes or offences; and no person surrendered by or to either of the Contracting Parties in virtue of this Convention shall be tried or

punished for a political crime or offence. When the offence charged comprises the act either of murder or assassination or of poisoning, either consummated or attempted, the fact that the offence was committed or attempted against the life of the Sovereign or Head of a foreign State or against the life of any member of his family, shall not be deemed sufficient to sustain that such crime or offence was of a political character; or was an act connected with crimes or offences of a political character.

ARTICLE IV.

No person shall be tried for any crime or offence other than that for which he was surrendered.

ARTICLE V.

A fugitive criminal shall not be surrendered under the provisions hereof, from lapse of time or other lawful cause, according to the laws of the place within the jurisdiction of which the crime was committed, the criminal is exempt from prosecution or punishment for the offence for which the surrender is asked.

ARTICLE VI.

If a fugitive criminal whose surrender may be claimed pursuant to the stipulations hereof, be actually under prosecution, out on bail or in custody, for a crime or offence committed in the country where he has sought asylum, or shall have been convicted thereof, his extradition may be deferred until such proceedings be determined, and until he shall have been set at liberty in due course of law.

Appendix "J"
Extradition Treaty—Paraguay

ARTICLE VII.

If a fugitive criminal claimed by one of the parties hereto, shall be also claimed by one or more powers pursuant to treaty provisions, on account of crimes committed within their jurisdiction, such criminal shall be delivered to that State whose demand is first received.

ARTICLE VIII.

Under the stipulations of this Convention, neither of the Contracting Parties shall be bound to deliver up its own citizens.

ARTICLE IX.

The expense of arrest, detention, examination and transportation of the accused shall be paid by the Government which has preferred the demand for extradition.

ARTICLE X.

Everything found in the possession of the fugitive criminal at the time of his arrest, whether being the proceeds of the crime or offence, or which may be material as evidence in making proof of the crime, shall so far as practicable, according to the laws of either of the Contracting Parties, be delivered up with his person at the time of surrender. Nevertheless, the rights of a third party with regard to the articles aforesaid, shall be duly respected.

ARTICLE XI.

The stipulations of this Convention shall be applicable to all territory wherever situated, belonging to either of

the Contracting Parties or in the occupancy and under the control of either of them, during such occupancy or control.

Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the Contracting Parties. In the event of the absence of such agents from the country or its seat of Government, or where extradition is sought from a colonial possession of Paraguay or from territory included in the preceding paragraphs, other than the United States, requisitions may be made by superior Consular officers. It shall be competent for such diplomatic or superior consular officers to ask and obtain a mandate or preliminary warrant of arrest for the person whose surrender is sought, whereupon the judges and magistrates of the two Governments shall respectively have power and authority, upon complaint made under oath, to issue a warrant for the apprehension of the person charged, in order that he or she may be brought before such judge or magistrate, that the evidence of criminality may be heard and considered and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of the fugitive.

If the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced. If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case.

Appendix "J"
Extradition Treaty—Paraguay

ARTICLE XII.

If when a person accused shall have been arrested in virtue of the mandate or preliminary warrant of arrest, issued by the competent authority as provided in Article XI hereof, and been brought before a judge or magistrate to the end that the evidence of his or her guilt may be heard and examined as hereinbefore provided, it shall appear that the mandate or preliminary warrant of arrest has been issued in pursuance of a request or declaration received by telegraph from the Government asking for the extradition, it shall be competent for the judge or magistrate at his discretion to hold the accused for a period not exceeding two months, so that the demanding Government may have opportunity to lay before such judge or magistrate legal evidence of the guilt of the accused and if at the expiration of said period of two months, such legal evidence shall not have been produced before such judge or magistrate, the person arrested shall be released, provided that the examination of the charges preferred against such accused person shall not be actually going on.

ARTICLE XIII.

In every case of a request made by either of the two Contracting Parties for the arrest, detention or extradition of fugitive criminals, the legal officers or fiscal Ministry of the country where the proceedings of extradition are had, shall assist the officers of the Government demanding the extradition before the respective judges and magistrates, by every legal means within their or its power; and no claim whatever for compensation for any of the services so rendered shall be made against the Government demanding the extradition, provided, however, that any officer or offi-

cers of the surrendering Government so giving assistance, who shall, in the usual course of their duty, receive no salary or compensation other than specific fees for services performed, shall be entitled to receive from the Government demanding the extradition the customary fees for the acts or services performed by them, in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers.

ARTICLE XIV.

This Convention shall take effect from the day of the exchange of the ratifications thereof; but either Contracting Party may at any time terminate the same on giving to the other six months notice of its intention to do so.

The ratifications of the present treaty shall be exchanged in the city of Asunción as soon as possible.

In witness whereof, the respective Plenipotentiaries have signed this treaty and have affixed thereto their respective seals.

Done at Asunción this twenty-sixth day of March, in the year of our Lord one thousand nine hundred and thirteen.

NICOLAY A. GREVSTAD [SEAL.]

EUSEBIO AYALA. [SEAL.]

And whereas the said Treaty has been duly ratified on both parts, and the ratifications of the two governments were exchanged in the City of Asunción, on the seventeenth day of January, one thousand nine hundred and fourteen;

Appendix "J"
Extradition Treaty—Paraguay

Now, therefore, be it known that I, Woodrow Wilson, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty-fourth day of January in the year of our Lord one thousand
[SEAL.] nine hundred and fourteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

WOODROW WILSON

By the President:

W. J. BRYAN
Secretary of State.

LIBRARY
SUPREME COURT, U. S.

No. 73-361

SUPREME COURT, U. S.
FILED
NOV 14 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

AUGUSTE JOSEPH RICORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

JEROME M. FEIT,
JUDITH A. METZNER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	14

CITATIONS

Cases:

Almeida-Sanchez v. *United States*, No. 71-6278, decided June 21, 1973	9, 10
Bass v. *United States*, 326 F.2d 884, certiorari denied, 377 U.S. 905	12
Brown v. *United States*, 411 U.S. 223	8
Carroll v. *United States*, 267 U.S. 132	11
Chambers v. *Maroney*, 399 U.S. 42	10, 11
Costello v. *United States*, 350 U.S. 359	7
Draper v. *United States*, 358 U.S. 307	10
Fiocconi v. *Attorney General*, 462 F.2d 475, certiorari denied, 409 U.S. 1059	6
Frisbie v. *Collins*, 342 U.S. 519	6
Jones v. *United States*, 362 U.S. 257	8
Ker v. *Illinois*, 119 U.S. 436	6
Lawn v. *United States*, 355 U.S. 339	7
United States v. *Blue*, 384 U.S. 251	7
United States v. *Calabro*, 449 F.2d 885, certiorari denied, 404 U.S. 1047	12
United States v. *Estepa*, 471 F.2d 1132	7, 8
United States v. *Febre*, 425 F.2d 107, certiorari denied, 400 U.S. 849	12

Cases—Continued Page

United States v. *Garcia*, 452 F.2d 419 10
United States v. *Glaziou*, 402 F.2d 8, certiorari denied, 393 U.S. 1121 10
United States v. *Rodriquez-Gonzalez*, 378 F.2d 256 10
Walker v. *United States*, 404 F.2d 900 10

Statutes:

21 U.S.C. (1964 ed.) 173 ..... 2, 5, 6
21 U.S.C. (1964 ed.) 174 ..... 2, 5, 6, 11-12

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-361

AUGUSTE JOSEPH RICORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1973 (Pet. App. 1a-2a). A petition for rehearing was denied on June 28, 1973 (Pet. App. 3a). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and includ-

ing August 27, 1973, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly extradited to the United States from Paraguay.

2. Whether the grand jury improperly considered hearsay evidence.

3. Whether the district court correctly denied petitioner's motion to suppress evidence.

4. Whether the evidence proved petitioner's guilty knowledge.

5. Whether the conduct of the district judge deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit narcotics offenses, in violation of former 21 U.S.C. 173 and 174. He was sentenced to twenty years' imprisonment and fined $20,000. The court of appeals affirmed from the bench without opinion (Pet. App. 1a-2a).

1. On September 18, 1970, United States Customs agents in Miami were furnished a copy of an anonymous letter directed to the FBI, describing in detail certain small aircraft said to be carrying large quantities of narcotics into the United States (Tr. 55-

59).[1] On October 18, 1970, one of these airplanes arrived at Miami International Airport from Kingston, Jamaica (MS 23-24, 33). Upon its arrival at Miami, the craft and its occupants were placed under surveillance. The two pilots left the plane, cleared Customs inspections, and went by taxi to Miami (MS 34-35, 44-51, 110-114).

On the following day, October 19, 1970, the pilots (Bianchi and Balestra) returned to the plane and flew to a small local airport at North Perry, fifteen miles from Miami. The flight took forty minutes, because Bianchi made evasive maneuvers in an unsuccessful attempt to evade the surveillance officers' aircraft (MS 130-134). Bianchi and Balestra left the airplane at North Perry and drove to Miami, following a circuitous route. The plane remained under surveillance (MS 68-69, 115-118). That evening, Customs agents entered the plane and discovered two suitcases hidden behind a fuel tank. A plastic bag containing white powder was removed from one of the suitcases, and tests disclosed the presence of heroin (MS 71-74). On October 20, 1970, the agents re-entered the aircraft, removing the two suitcases and another. The three valises contained a total of 94 pounds, or 42 kilograms, of heroin (MS 84-85; Tr. 407-425).

2. Bianchi was arrested on October 20 as he attempted to board a commercial airliner to return to

---

[1] "Tr." refers to the transcript of trial, "MS" to the transcript of the hearing on the motion to suppress, and "Doc." to the various numbered documents comprising the certified record on file with the Clerk of this Court.

Paraguay. He agreed to cooperate with the agents and implicated several other co-conspirators (Tr. 257-258, 772, 783-784). Bianchi revealed that he had met with co-conspirators Varela and Muravnik in June 1970 and arranged to fly 60 kilograms of heroin to the United States. They had obtained the narcotics from petitioner in Paraguay, at a motel petitioner owned there. Petitioner showed them to the cabin where the heroin was kept and personally assisted them in removing the packages. Bianchi flew the heroin to Miami, arriving on June 24, 1970 (Tr. 217-228).

In July 1970, Varela, Muravnik, and co-conspirators Becker and Gahou, pursuant to orders from petitioner, had traveled to Uruguay to receive delivery of a Citroen automobile arriving by ship from France. They drove the vehicle to Varela's house in Paraguay, where petitioner went to claim it. Inside the Citroen were concealed 70 kilograms of heroin (Tr. 537-542, 708-709).

On September 2, 1970, Bianchi flew to Miami from South America and Panama at Varela's request, carrying a load of 30 kilograms of heroin (Tr. 233-238, 543-545). The following month, fifteen kilograms of heroin were transported from Miami to New York by some of the conspirators and delivered to Nicholas Giannatasio, pursuant to instructions from petitioner. Giannatasio gave conspirator Gahou $107,000 in cash. Becker took $100,000 of this money to Paraguay, where Varela delivered it to petitioner (Tr. 555-568, 710-721).

Several days later, in mid-October 1970, petitioner delivered another load of heroin, totalling 42 kilograms, to Varela and Bianchi at petitioner's motel in Paraguay (Tr. 245-254). It was while Bianchi was attempting to deliver this shipment that the scheme was discovered by Customs agents and Bianchi was apprehended.

ARGUMENT

1. Petitioner contends that the federal government's actions in procuring his extradition from Paraguay were so offensive to that nation as to deprive the United States courts of jurisdiction of the instant case. We submit, however, that petitioner is without standing to present the issue here. He contested his extradition in the courts of Paraguay on the same grounds raised below; the government of Paraguay nevertheless ordered his surrender to the United States for prosecution.

The record conclusively shows that from the time of the formal extradition request, Paraguay was at all times fully advised of this nation's reasons for seeking petitioner's removal. The United States Ambassador averred that petitioner, who was not known to have entered the United States, had been indicted for conspiracy to violate 21 U.S.C. (1964 ed.) 173 and 174 in connection with a major narcotics importation enterprise. The extradition request was based upon the procedures outlined in the treaty of extradition in effect between the United States and Paraguay, and on general principles of comity, particu-

larly in view of the seriousness of the international narcotics problem and the willingness of other nations to extradite for narcotics offenses despite the absence of specific treaty provisions (Doc. 19).

No misrepresentations were made to the Paraguayan government, and petitioner was tried for the precise offense for which he was extradited.[2] Petitioner was treated exactly as Paraguay expected when that nation ordered petitioner's surrender. Petitioner has not shown that our government's conduct in any way offended the government of Paraguay. Unless Paraguay would have cause to complain, petitioner cannot raise that country's rights as a defense to extradition. *Ker* v. *Illinois*, 119 U.S. 436, 441; *Fiocconi* v. *Attorney General*, 462 F.2d 475 (C.A. 2), certiorari denied, 409 U.S. 1059. In any event, even if petitioner were removed from Paraguay as the result of an irregular or illegal extradition procedure, that is no bar to the exercise of jurisdiction by a court which has obtained control of petitioner's person. *Frisbie* v. *Collins*, 342 U.S. 519, 522; *Ker* v. *Illinois*, *supra*, 119 U.S. at 440.

2. Petitioner urges that hearsay evidence was improperly submitted to the grand jury which indicted him. In March 1971, petitioner was indicted on a charge of conspiracy to violate 21 U.S.C. (1964 ed.) 173 and 174. In October 1972, following petitioner's extradition to the United States, a superseding in-

---

[2] Petitioner was tried on a superseding indictment returned after his arrival in the United States, but the later indictment did not differ from the first insofar as it pertained to petitioner.

dictment was returned, identical to the first insofar as it concerned petitioner, and it was on the second indictment that petitioner was tried. The second grand jury heard the transcript of the first grand jury proceeding, read by the prosecutor. The transcript contained the testimony of Felix Becker, a co-conspirator. As petitioner acknowledges (Pet. 13-14), the minutes were furnished to petitioner and used in cross-examining Becker at trial.

In contending that an indictment may not be based entirely on hearsay, petitioner misconstrues the clear holding of this Court in *Costello* v. *United States*, 350 U.S. 359, where it was stated (*id.* at 363):

> An indictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

Accordingly, "[n]either justice nor the concept of a fair trial" requires the Court to establish a rule permitting challenges to indictments based upon the sufficiency or competency of the evidence presented to the grand jury. *Id.* at 364; see also *Lawn* v. *United States*, 355 U.S. 339, 349-350. Petitioner's rights were protected by the full safeguards of trial. Cf. *United States* v. *Blue*, 384 U.S. 251, 255, n. 3. Moreover, petitioner can claim no prejudice, since the transcript of the eyewitness's prior testimony was made available for his use in impeaching the credibility of the witness at trial.[3]

---

[3] Petitioner's reliance upon *United States* v. *Estepa*, 471 F.2d 1132 (C.A. 2), and other Second Circuit cases is un-

3. Petitioner contends that the district court erred in refusing to suppress as evidence the heroin discovered during the warrantless search of the airplane belonging to co-conspirator Bianchi. However, the search was not directed against petitioner, who was wholly unknown to the agents at the time of the search. Petitioner is without standing to challenge the search and seizure, since he was not in or about the aircraft at the time of the search, alleged no proprietary interest therein, and was not charged with an offense which includes possession of the contraband as a necessary element. *Brown* v. *United States*, 411 U.S. 223, 229. See *Jones* v. *United States*, 362 U.S. 257, 263-264.

Petitioner appears to rely for standing upon the fact that the government's bill of particulars alleged petitioner to be the owner of the heroin (Pet. 22). However, since illegally imported heroin is contraband, and wrongfully held, petitioner could have no legitimate interest or expectation of privacy in his ownership of the drug in the United States. Cf. *Brown* v. *United States*, *supra*, 411 U.S. at 230, n. 4; *Jones* v. *United States*, *supra*, 362 U.S. at 267.[4]

---

availing, since the grand jury in the instant case was fully aware of the nature of the testimony presented to it. The applicability of *Estepa* was briefed below, and the court of appeals, in affirming petitioner's conviction, implicitly recognized that its previous holding in *Estepa* had no effect here.

[4] Neither the intrusion into the aircraft nor the search thereof affected any right or expectation of privacy of petitioner. Thus, petitioner clearly had no standing to object to the legality of the search prior to the time that the hidden suitcases containing the heroin came, as a result of the search,

Moreover, the district court properly concluded that the warrantless search could be upheld either as a border search or as a search upon probable cause (Pet. App. 23a-24a). In arguing that a search of the aircraft at the North Perry airport could not be sustained as a border search, petitioner relies on *Almeida-Sanchez* v. *United States*, No. 71-6278, decided June 21, 1973. That case, however, holding only that "border searches" do not include random, roving searches of automobiles conducted some distance from the border or its functional equivalent, has no application to the facts here.

In the instant case, the search was not "random" or "roving". Customs officials had received an anonymous but detailed tip concerning the use of particular aircraft to import narcotics. When one of these aircraft landed at Miami International Airport, no immediate "border search" of the aircraft was undertaken, but it and its occupants were placed under surveillance. Thereafter, the craft was flown to a small, local airport only a few miles away, following an evasive route under aerial surveillance. The craft was searched later that day, after the pilot had left it and returned to Miami by automobile, again using a devious route.

The right to conduct a full customs search, without probable cause, at the time of the aircraft's arrival in Miami can scarcely be questioned. Nor should the investigatory officers, who suspected a

---

into plain view. At that point, there was manifest probable cause for the seizure.

major narcotics smuggling operation, have been required to tip their hand by an immediate search, when surveillance of the plane and its occupants for a day or two offered the prospect of further uncovering details of the suspected criminal conspiracy. As a result of this surveillance, it was reasonably certain that the plane and its contents were intact—as at the time of crossing the border—when the search did take place, so that the search was indeed the "functional equivalent" of a border search.[5]

Moreover, the combined circumstances—the appearance of an aircraft which was the subject of the anonymous tip, the evasive maneuvers after takeoff from Miami and the subsequent landing a few miles away after 40 minutes in the air, the suspicious actions of the pilots—all gave the Customs officers probable cause to believe that the tip was accurate and that the plane was being used to transport contraband. Cf. *Chambers* v. *Maroney*, 399 U.S. 42, 46; *Draper* v. *United States*, 358 U.S. 307, 313. Accordingly, even if the search were not sustainable as a border search not requiring probable cause, it was entirely proper as based on probable cause. A warrant could not practically have been required, more-

---

[5] It has been recognized both in *Almeida-Sanchez* (slip op., pp. 6-7) and other cases that customs searches may be conducted at times and places distant from the actual border crossing. See *United States* v. *Garcia*, 452 F.2d 419, 421-422 (C.A. 5); *Walker* v. *United States*, 404 F.2d 900 (C.A. 5); *United States* v. *Rodriguez-Gonzalez*, 378 F.2d 256 (C.A. 9). See also *United States* v. *Glaziou*, 402 F.2d 8 (C.A. 2), certiorari denied, 393 U.S. 1121.

over, since the parked plane could have been readied for takeoff in a few seconds (MS 60; Pet. App. 23a). See *Carroll* v. *United States*, 267 U.S. 132, 153-156; *Chambers* v. *Maroney*, *supra*, 399 U.S. at 51.

4. Petitioner contends that the government failed to prove petitioner's guilty knowledge in connection with the conspiracy. In fact, however, petitioner's knowing participation in the crime is well supported by the evidence.

In the instant case, as our statement of facts shows, the evidence established that on two occasions in 1970 petitioner led co-conspirators to a cabin of the motel which he owned in Paraguay and assisted them in removing a total of more than one hundred kilograms of heroin from the motel for export to the United States (Tr. 217-228, 245-254). On another occasion, petitioner directed other co-conspirators to pick up an automobile arriving from France, which contained a large quantity of concealed heroin (Tr. 537-542, 708-709). He also accepted payment of $100,000 in cash for heroin delivered in New York (Tr. 555-568, 710-721).

That petitioner was aware of the nature of the substance with which he dealt is manifest from the furtive manner in which the business of the conspiracy was conducted and from the large sum of money involved. Hence, even apart from the statutory inference of former 21 U.S.C. 174,[6] it is clear that

---

[6] As petitioner notes (Pet. 26), the government was entitled to avail itself of a statutory inference under 21 U.S.C. (1964

the jury was entitled to believe that petitioner knowingly possessed heroin and that he knowingly conspired to introduce the drug illegally into the United States.

5. Petitioner cites numerous incidents that in his view constitute examples of prejudicial conduct on the part of the trial judge. The principal contention is that petitioner was afforded insufficient time to prepare for trial. The record shows, however, that petitioner's attorney entered his appearance in the case in September 1972, shortly after petitioner's extradition to the United States and nearly ninety days before trial.[7] Petitioner filed numerous motions, and hearings were set for October 16, 1972, with trial to follow on October 30. Petitioner, however, requested and was granted a five-week adjournment of trial to December 4 (Doc. 22, p. 43).

It was not until late November 1972 that petitioner sought permission to depose witnesses in Paraguay

---

ed.) 174, which permitted the jury to convict if it found petitioner to have an unexplained possession of the narcotics.

Purely circumstantial evidence is sufficient to show possession. *United States* v. *Febre*, 425 F.2d 107, 110 (C.A. 2), certiorari denied, 400 U.S. 849. Moreover, a showing of dominion and control of the drug sufficient to amount to constructive possession will suffice to invoke the statutory inference. *United States* v. *Calabro*, 449 F.2d 885, 891-892 (C.A. 2), certiorari denied, 404 U.S. 1047; *United States* v. *Febre*, *supra*, 425 F.2d at 111; *Bass* v. *United States*, 326 F.2d 884, 886-887 (C.A. 8), certiorari denied, 377 U.S. 905.

[7] Since petitioner was incarcerated, the government was entitled to only ninety days to prepare for trial under the Second Circuit's "Rules Regarding Prompt Disposition of Criminal Cases."

and to interview government witnesses. The court granted these requests, imposing only the condition that these activities not delay the commencement of the trial (Doc. 26, pp. 2-3). It is thus plain that it was only petitioner's tardiness, and not unreasonable rulings of the court, which "forced" petitioner to trial less fully prepared than he might have wished. Moreover, as the district court noted (Tr. 1316), the conduct of petitioner's counsel during the trial manifested careful and thorough preparation.

Petitioner also argues that the trial court failed to safeguard against the possibility that the jury would be influenced by newspaper publicity concerning petitioner. The record fully answers this assertion. During the *voir dire* of prospective jurors, the court asked whether any of the venire had read or heard anything about the case in the news media (Tr. 30-31).[8] Throughout the trial as well, the court repeatedly cautioned the jurors against exposing themselves to news reports concerning the case (*e.g.*, Tr. 183-184, 349, 528). When petitioner's counsel complained during the trial that a prejudicial story had appeared in the *New York Times*, the court inquired whether any of the jurors had read the *Times* or any of several suburban newspapers (Tr. 352-353, 363-365). None said they had.

Petitioner's other allegations of judicial misconduct are similarly without basis in fact. The record shows

---

[8] The sole juror who had seen a news item concerning the case was not challenged by petitioner peremptorily or for cause (Tr. 54-55).

that the trial was conducted in an orderly atmosphere, with no apparent hostility between the defense and the court, and that the court at all times was careful to ensure that petitioner received a fair and impartial trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
JUDITH A. METZNER,
Attorneys.

NOVEMBER 1973.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 525933 119

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 30 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

Docket No. 73-361

AUGUSTE JOSEPH RICORD,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

HEBBERT IRA HANDMAN
Attorney for Petitioner
36 West 44th Street
New York, N. Y. 10036
Tel. (212) 986-5460

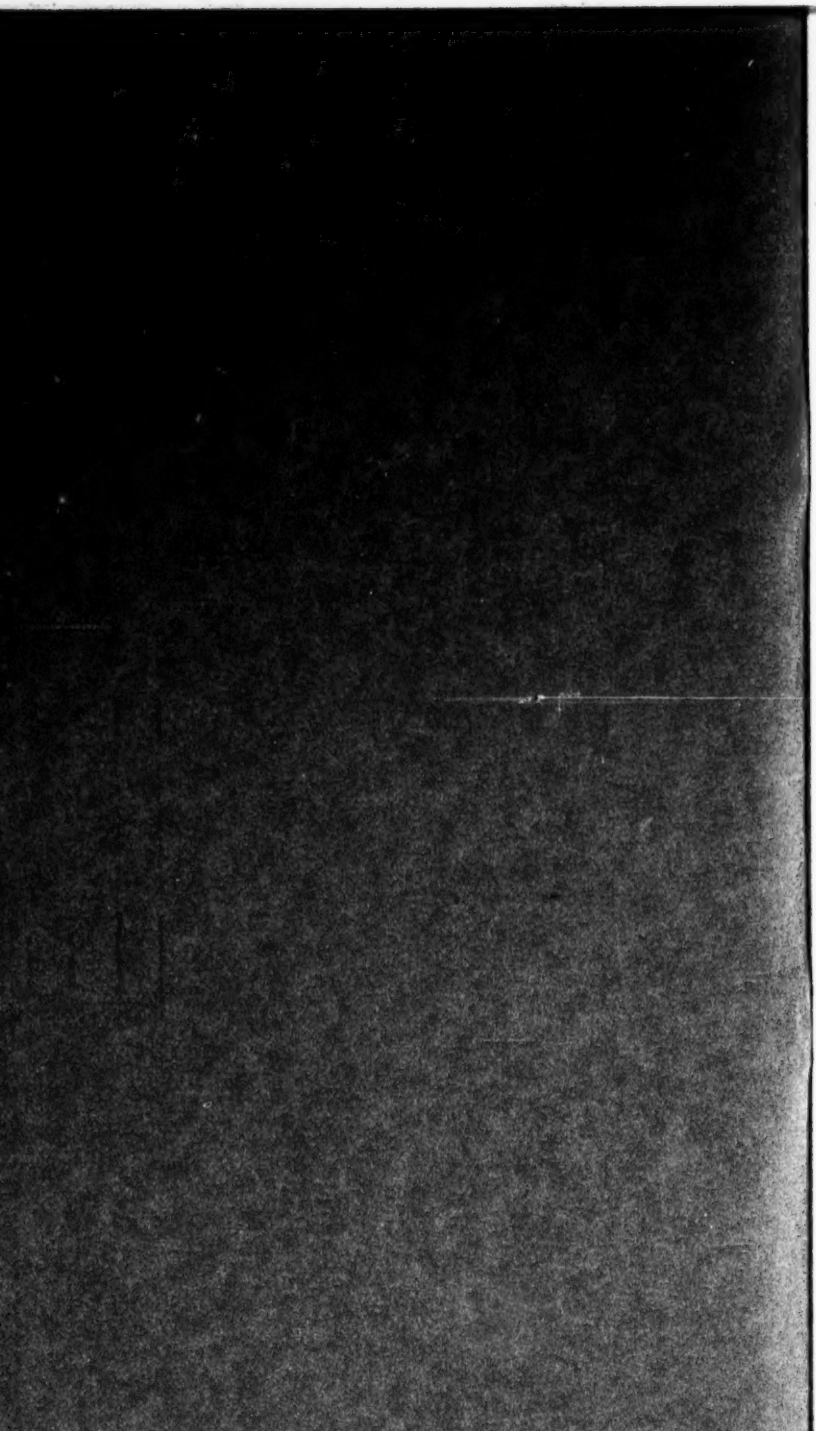

TABLE OF CONTENTS

	PAGE
POINT I—The Law	1
POINT II—The Government Arguments	3
POINT III—The Facts	4
POINT IV—The Extradition	6
CONCLUSION	9

IN THE

Supreme Court of the United States

October Term, 1973

Docket No. 73-361

AUGUSTE JOSEPH RICORD,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

The Court is respectfully requested to accept the filing of this Reply Brief to the Government's Brief in Opposition to the Petition of Auguste Joseph Ricord for a Writ of Certiorari filed herein. The Petitioner's request is motivated by the fact that the Government in its Brief in Opposition has made certain representations as to the facts, the law and Government arguments which are just not correct.

POINT I

The Law

As to the law, the Government naturally relies on the *Costello* case which was carefully discussed in Petitioner's Brief. The Government has deliberately avoided facing the fact that in the *Costello* case, there were live grand jury witnesses who summarized a vast amount of documentary and other evidence. As pointed out in Petitioner's Brief,

the *Costello* case does not stand for the proposition that a prosecutor has an unlimited right to use hearsay alone if live witnesses are available. In the instant case, we don't even have hearsay for there was not a single witness before the Grand Jury.* The Assistant United States Attorney according to the record was not sworn nor did he testify; he merely read to the Grand Jury which handed down the indictment the minutes of previous Grand Jury proceedings.

This Court is without the benefit of the minutes of the Grand Jury proceedings in this case, because the Trial Judge repeatedly refused to furnish the Petitioner with the minutes of the proceedings or to permit an inspection by Petitioner. In *Costello,* the Grand Jury proceedings had been made available to the defendant and were extensively commented on by this Court in its opinions.

Petitioner submits that what happened in this instant case is for all practical purposes the prosecution by *An Information* of the Prosecutor in complete and absolute derogation of the Constitutional requirement set forth in the Fifth Amendment.

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * *."

There are many who argue that the "Information" method of instituting a criminal prosecution is desirable. However that may be, a Federal Prosecutor can not by-pass the Fifth Amendment requirements of a Grand Jury Indictment, until the Constitution of United States has been amended in such respect.

---

* In Petitioner's Brief (p. 7) Assistant United States Attorney Phillips is stated to have been a witness before the Grand Jury. A careful analysis of the record indicates that he was not a witness for in his affidavit referred to on pages 7 and 8, all Phillips said was that he read the Grand Jury minutes relating to the previous indictment.

POINT II

The Government Arguments

The Government in its Brief in Opposition blandly asserts that any infirmities in the present indictment of Petitioner were cured by the fact that there had been an earlier indictment of Petitioner.

This previous indictment involving Petitioner was never tested or explored in any way as the Indictment on which Petitioner was convicted was handed down prior to the determination of any pre-trial proceedings relating to the previous indictment.

The Government makes much of the fact that at the Petitioner's trial, the Government furnished the Petitioner with the testimony of such prosecution witnesses as testified before the Grand Jury which handed down the previous indictment.

Naturally such testimony was made available as within the principles of *Brady* v. *Maryland,* and other court decisions, as well as the requirements of the Jencks Act. However, the record in this case does not include the testimony of such prosecution witnesses but only such limited portions as were used in the cross-examination of such witnesses by Petitioner's counsel.

The Government argues speciously and almost beyond belief that even if the indictment on which Petitioner was convicted was defective because of the failure to call any witnesses or total hearsay, etc., nevertheless such defect was cured by the fact that Petitioner had previously been indicted by a Grand Jury which had heard live witnesses and handed down a valid indictment.

An argument such as this one of the Government's is so preposterous as to create a problem as to how to answer it completely and still succinctly.

First, the minutes of neither of the Grand Jury proceedings are before this Court, except for the limited testimony of prosecution witnesses in connection with the previous indictment used in cross-examination as explained above.

Second, it is impossible to cure a defect in the instant indictment by something which happened prior to the indictment.

Third and very important, due to the trial court's continuous denial of access to the Grand Jury minutes and proceedings, we are dealing with speculation as to *unknowns*.

Fourth, it was the Government's own conduct which created this situation, not the Petitioner's, so that every doubt must be resolved against the prosecution and in favor of Petitioner.

POINT III

The Facts

Government brief page ten:

> "A warrant could not practically have been required, . . ."

Facts: a. The entry of the airplane into the United States was observed by government agents and its movements were followed for over 24 hours before the search.

b. The Government personnel were from the Federal Bureau of Investigation, the Bureau of Narcotics and Dangerous drugs and the United States Department of Customs.

c. These personnel had at their disposal and actually used radio communication, automobiles and airplanes in this surveillance.

d. When the airplane was parked for over twelve hours at the site where the repeated searches took place, there were about ten armed agents surrounding the airplane which was off the runway, tied down and blocked.

e. When the first search on the 19th of October 1970, allegedly revealed one packet of powder, no warrant was obtained prior to the second search the following day.

Government brief page four:

"They had obtained the narcotics from petitioner in Paraguay . . ."

Facts: a. The Government witness Bianchi, an admitted smuggler and liar, is the only one who testified regarding delivery of the narcotics.

b. He swore that he accompanied another man to defendant Ricord's Hotel on two occasions and never had or heard any conversation with Ricord.

c. That the other man went to a hotel room and on each occasion removed ordinary luggage or Christmas gift packages from the room to his car.

d. That on one occasion Ricord helped put the valises in the car trunk.

e. It is undisputed that Ricord built and helped operate the hotel.

There is absolutely no basis for the assumption that the defendant had knowledge or control of the room or luggage of the person occupying a room at his hotel.

Government brief page four:

"$100,000 . . . Varela delivered it to petitioner."

Fact: 1. **One co-conspirator, an admitted liar, said that he saw the defendant Ricord receive one hundred thousand dollars from another alleged conspirator.**

2. **He does not testify to any conversation between defendant and this person who allegedly gave defendant the money nor to any agreement between them as to what the payment was for or indeed whether it related to narcotics at all.**

3. **As noted on page 34 of the Petition, the trial Court erroneously excluded testimony to the effect that at about the same time as this witness was to have brought this cash to Paraguay, another of the conspirators deposited approximately $75,000 in a commercial bank in New York City, which would not have left enough cash to make the alleged Paraguay delivery to Ricord possible.**

POINT IV

The Extradition

The Government's argument is that the acts the United States Government commits outside of the territorial limits of this country are not material to the legality and constitutionality of an extradition nor to the question of jurisdiction over the person of an accused. In effect, this argument goes so far as to say that the judicial branch of the United States Govtrnment can not and will not concern itself with any misconduct on the part of the executive branch of the United States Government where such misconduct takes place outside of the territorial limits of the United States.

We submit that such is not and never has been the law. We further submit that the judicial branch of this Govern-

ment has a duty to put an end to this kind of thinking and this kind of action on the part of our executive branch and its agents and employees.

Petitioner's extradition is a *cause celebre* that has been publicized world wide. Although this shockingly illegal and immoral conduct took place several years ago, it was commented upon a magazine article which was published this month.

> "Under Bahamian law, it seems, only certain kinds of alleged crimes are extraditable offenses. The other two charges, according to the United States Government, did not fill the bill. Perhaps it was the iron logic of Bahamian law, or possibly the military might backing the principled position of Prime Minister Lynden Pindling's government. *In any case, the United States, which once successfully skirted every rule of international law to collar heroin smuggler Auguste Ricord of Argentina, said that it was stymied in Nassau"* (emphasis added). New York Magazine, November 23, 1973.

The leading representative of the United States involved in Petitioner's extradition proceedings in Paraguay, one Nelson Gross, is now under indictment for a similar crime here in this country, which has been well publicized to the embarrassment of the executive branch of the Government.

One of the leading authors on constitutional law and the power of the judiciary in the United States has commented as follows about situations such as Petitioner's.

> "See generally Scott, *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud,* 37 Minn. L. Rev. 91 (1953). See also Fairman, *Ker* v. *Illinois Revisited,* 47 Am. J. Int'l L. 678 (1953). This doctrine has been seriously questioned where the police illegality is fla-

grant. See Allen, *Due Process and State Criminal Procedures: Another Look,* 48 Nw. U. L. Rev. 16, 27-28 (1953); Scott, supra, at 97-98, Professor Scott predicts that the position taken by the lower *federal* courts that they have jurisdiction to try a defendant abducted from a foreign country 'will doubtless be overruled' when the Supreme Court passes on the question 'in view of the high standards required by the Court of federal law enforcement officers in other areas of law enforcement.' Id. at 100 n. 40.

The proposal has been made that 'no magistrate shall have jurisdiction over any defendant who has been brought before him by virtue of an illegal arrest.' ote, 100 U. Pa. L. Revw. 1182, 1215 (1952). But if a subsequent warrant is properly issued 'there is no reason why the person should not be rearrested, and the officer at least has been taught to respect the law,' ibid.

It has been held that 'Fourth Amendment considerations require that before a person can be extradited * * * the authorities in the asylum state must be satisfied that the affidavit shows probable cause.' *Kirkland* v. *Preston,* 385 F.2d 670 (D.C. Cir. 1967)."

Petitioner submits that respect for law is something which should be required of our Government representatives, agents and agencies wherever they may be and whatever they are doing.

The failure of the Executive Branch of our Government to respect the law and its conduct in putting itself above the law should be curbed or this country will be no different than any other "gestapo state." The last two years have brought to the public attention this cancerous growth in the Executive Branch of the Government which can only be stopped by courageous radical surgery by the Judicial Department of our Government.

CONCLUSION

This conviction must be reversed.

Respectfully submitted,

HERBERT IRA HANDMAN
Attorney for Petitioner
36 West 44th Street
New York, N. Y. 10036
Tel. (212) 986-5460